

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

77-1143

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1143

UNITED STATES OF AMERICA,

Appellee,

—v.—

HOWARD E. SAFT,

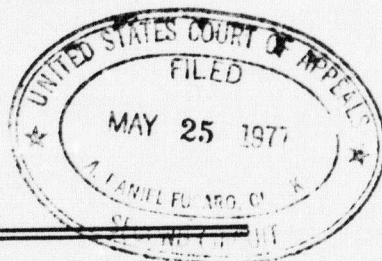
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

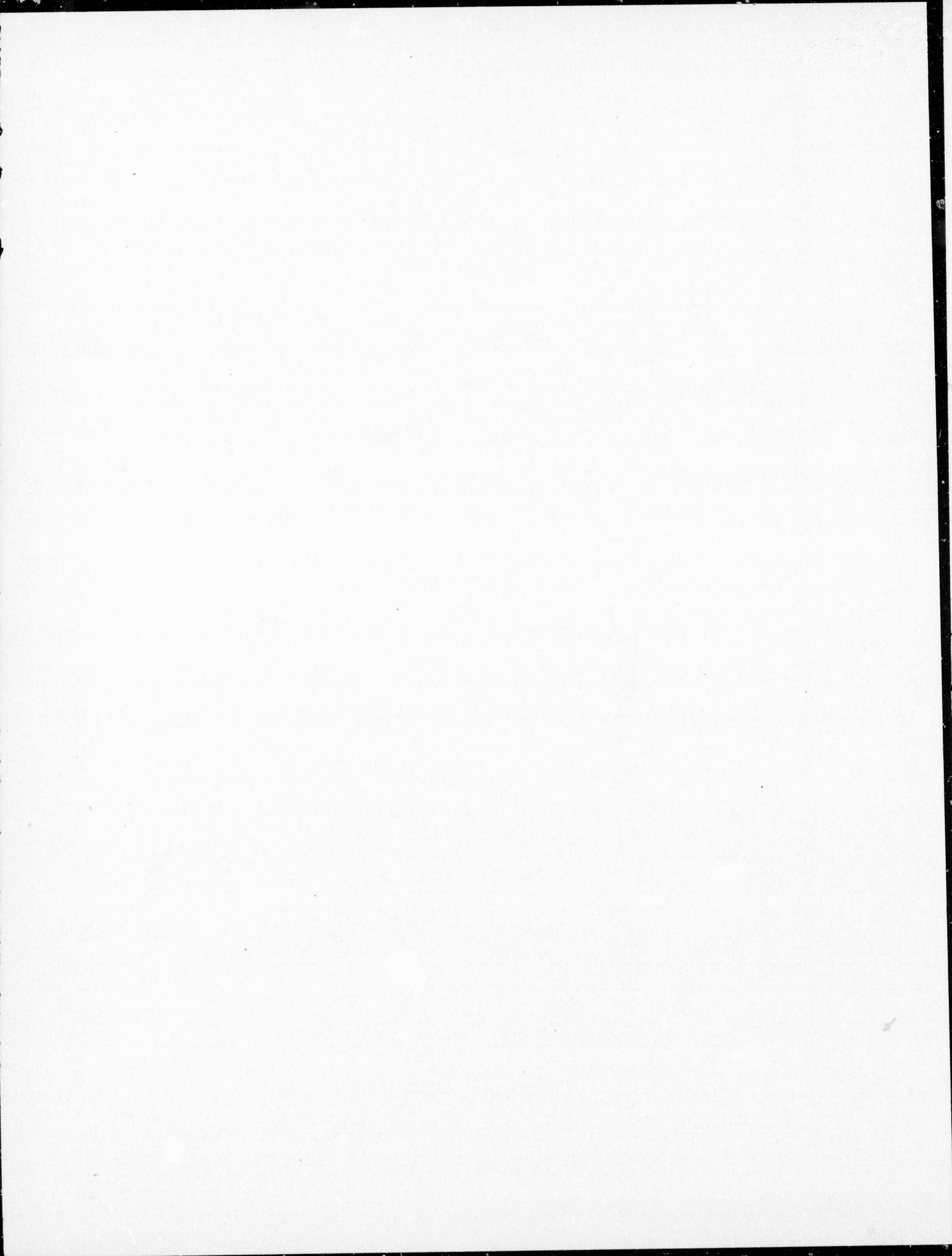
STEVEN A. SCHATTEN,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

HOWARD E. SAFT, et al.,

Defendants.

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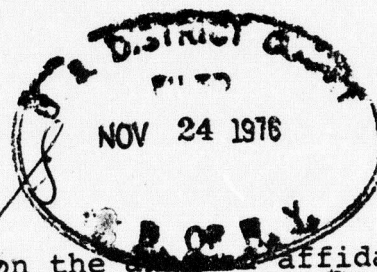
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76 CR 414 (LWP)

NOTICE OF MOTION



S I R S:

PLEASE TAKE NOTICE that upon the affidavits of Howard E. Saft, Jack M. Portney, and David L. Fox, Esq., each duly sworn to the 22nd day of November, 1976, the affidavit of Angelo T. Cometa, Esq., sworn to on the 23rd day of November, 1976, the indictment on file with the office of the Clerk of this Court, and upon all proceedings heretofore had herein, the undersigned move this Court, at the Courthouse, Foley Square, New York, New York, on the 8th day of December, 1976, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 32(d) Federal Rules of Criminal Procedure, permitting defendant Howard E. Saft to withdraw his guilty plea entered on September 28, 1976, and for such

other and further relief as to this Court may appear just and proper.

Dated: New York, New York
November 23, 1976

Yours, etc.,

PHILLIPS, NIZER, BENJAMIN, KRIM &
BALLON

Attorneys for defendant Howard E. Saft
40 West 57th Street
New York, New York 10019
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TO: STEVEN A. SCHATTEN, Esq.
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1 St. Andrews Plaza
New York, New York 10007
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

76 CR 414 (LWP)

-against-

AFFIDAVIT OF
HOWARD E. SAFT

HOWARD E. SAFT, et al.,

Defendants.
-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HOWARD E. SAFT, being duly sworn, deposes and says:

I am a defendant herein. I submit this affidavit in support of my motion, pursuant to Rule 32(d) Federal Rules of Criminal Procedure, to withdraw, prior to the imposition of sentence, my plea of guilty to three counts of the instant indictment, entered on September 28, 1976.

I respectfully request the Court to allow me to withdraw my plea because:

1. I am innocent and have consistently asserted my innocence;
2. I entered the plea upon the persuasion of my counsel, under circumstances which vitiate the voluntary nature of my action;
3. I have a viable and meritorious defense to all the charges; and
4. The government will suffer no prejudice by my pre-sentence withdrawal of the plea.

I am advised that the Court must permit withdrawal of my plea if the Court determines that the plea was not entered voluntarily and that, in any event, the Court has the discretion to allow me to withdraw my plea prior to the imposition of sentence for any reason that is "fair and just". I respectfully submit that my reasons more than meet that standard. I would summarize the primary reasons for allowing withdrawal of my plea by saying that I am innocent, that I have consistently asserted my innocence, and that I entered the guilty plea because of the pressure and entreaties of my court-appointed counsel who advised me, although I repeatedly told him of my innocence, that it would be in my best interest to plead guilty.

My innocence -- and my defense to all the charges, including those to which I pleaded guilty -- is founded on my total lack of prior criminal knowledge, or lack of criminal intent. From the moment charges were made against me, I have never -- with the single exception of my statements in Court on September 28, 1976 -- admitted to anyone -- whether my lawyer, probation officer, my friends or members of my family -- that I am guilty of any offense.

The substance of this entire affidavit -- and if the Court desires, my sworn testimony under oath -- will be directed to explaining to the Court why I answered the Court's questions as I did during the allocution on September 28, 1976. I will set forth in some detail the events and circumstances immediately preceding the plea and the taking of the plea itself, and my determination immediately afterwards to withdraw it and proceed to trial.

I am aware that to date all the Court knows of me is what it has read in the indictment, what has been said about me by the prosecutor during the arraignment and the allocution, and what has been written by the prosecutor in his pre-sentence memorandum. The charges, the accusations, and the innuendos are not true. I believe it would be of assistance to the Court to have a summary of my personal and business background so that the Court may more fully understand why, during the allocution, I responded, against my will, in the affirmative to questions about my guilt, and why I urge that the Court grant me an opportunity to correct that record and demonstrate my innocence at trial.

My Business Background

I am fifty-three years old. I grew up in New York City. My father, who was an immigrant, supported the family as a butcher. I attended the City's public schools. After serving for three and a half years in the Southwest Pacific during World War II, I completed my education at Columbia University, where I received a Bachelor of Science degree in Business Administration in 1948.

After school, I worked for a while as a salesman-executive at Proctor & Gamble Corp. I received several promotions, and then I left the company and started a small jewelry manufacturing business on the West Side of Manhattan with an investment of \$500.

My business grew steadily and I became very successful as a jeweler, becoming a member of the Board of the New York Jewelry Board of Trade. In 1958, I formed Adlay Jewelry, Inc. as the primary means of conducting business. My prospects improved signifi-

cantly in 1958, when S. Klein's Department Stores suggested that Adlay lease retail space in its stores for the purpose of conducting a jewelry business. Throughout the 1960s and early 1970s, Adlay's business grew steadily and substantially, principally through the expansion into other stores of S. Klein's Department chain.

In 1972, Adlay was operating in approximately fifteen stores. In the next two years, 1973 and 1974, Adlay undertook a major expansion into more Klein stores, thirteen stores of the Robert Hall chain, and another thirteen stores of the Unishop chain. During this hectic expansion period, I was travelling throughout the country on a regular basis. Practically all of my time and energy was focused on the opening of the more than two dozen new outlets in major department stores throughout the country.

Of course, substantial long-term financing was required for the 1973-74 expansion. The transactions with the banks in this expansion period were conducted by Adlay's accountant, Leon Chaikin, just as similar transactions had been conducted throughout the company's existence.

Chaikin, who was a highly recommended certified public accountant, began to work for me in the mid 1950s. Over the years, he came to handle all of my personal and business accounting and financial transactions. With respect to Adlay, he was much more than an accountant or auditor. Unlike many businesses, Adlay never had an independent bookkeeping department or, for that matter, a comptroller for any period of time. Chaikin's accounting firm acted as my bookkeeper, my comptroller, my auditor, my accountant, my financial advisor and general overseer.

I trusted Chaikin completely and implicitly -- and, it seemed, with good reason. Through the many years, the Internal Revenue Service was satisfied with Adlay's returns and with my personal returns. In fact, in one year Adlay was chosen as an object of study by the Internal Revenue Service as a typical retail jewelry business, and we were audited that year with particular intensity. As in previous and future years, we were given a clean bill of health. Similarly, the financial statements prepared by Chaikin and submitted to lending institutions were always accepted and never, to my knowledge, questioned, so that sufficient operating funds were always forthcoming and the loans fully paid on their due dates.

I should add with respect to bank loans and other indebtednesses, such as notes given creditors, that until the Spring of 1974, my reputation as a businessman and my integrity were unquestioned. I never once, in more than twenty years in business, was a single day late in meeting any note or bank obligation. And, in all these years, I never availed myself of the protection a corporation gives to its principals; I personally guaranteed every bank loan made to Adlay or its subsidiaries, and generally co-signed all notes given to creditors.

With respect to the troubles of Adlay in the Spring of 1974, it should be stressed that much of the strain was unconnected to the financial machinations of Chaikin, about which I had no knowledge at the time. Adlay's problems were in large part due to the bankruptcy of Unishop in 1973 and the closing of the S. Klein

Department Store chain in 1974, so that between December 1973 and the end of 1974, thirty-two of the forty-five stores in which Adlay had jewelry departments were closed down because of the financial collapse of the giant business establishments upon which it relied.

Due to the S. Klein closing and the Unishop bankruptcy, and due to Adlay's own financial reverses which had not been revealed to me, Adlay filed a voluntary petition for bankruptcy under Chapter XI of the Bankruptcy Laws on June 6, 1974. Upon my urging, Adlay was not adjudged a bankrupt, and I did not file a personal petition for bankruptcy because I hoped, and I still intend -- as a matter of personal obligation -- that all of Adlay's creditors will be made whole in the future.

Adlay's bankruptcy left me literally penniless. When I ceased to receive a salary from Adlay in the Fall of 1974, I had no other assets and no other source of income. Prior to Adlay's bankruptcy, my only other asset was my home in East Hampton, and I satisfied my personal obligations to certain creditors by conveying to them my entire interest in the premises.

Because my time was so totally taken up with legal problems since October of 1974, I have tried to earn an income by squeezing in various jobs. In late 1974 and early 1975, I attempted to sell chemicals for a New York jobber. In 1975 I earned \$4,171.33 as a salesman of office supplies. This year I have earned \$1,812.43 working for the same office supply company. I have, to date, been unable to obtain regular employment. At one point, I attempted to obtain a hack license in order to drive a taxi at night to supplement my meager income, but was unable to do so due

to the charges pending against me.

I should add also that my attempts to obtain gainful employment in the past two years have been crippled by the rather thorough activities of various agencies, particularly the Federal Bureau of Investigation. The investigators -- whether motivated by the inquiry that led to the instant charges or by some of my political activities -- questioned all of my friends, business associates, employees and acquaintances in such a manner that my reputation was dragged through the mud, and any hopes of employment were dashed.

On occasions, and for short periods of time, friends have invited me to stay with them, but for the past year I have lived almost exclusively in one room of a thoroughly run down, vermin infested hotel on the lower west side. Last Summer, my nineteen year old son Robert stayed with me in the room.

Recently, I have obtained a position with a public relations firm which, although not now paying me a salary, has agreed to allow me to share in the future profits of the business. I hope, in the near future, to begin earning a regular income.

My Personal Background

Of course, not all my life has been spent on developing my business, nor, since 1974, defending myself and finding the means to survive.

While still in college, I was married, and my wife and I had a son, Robert, who is now nineteen years old and a sophomore at New York State University at Stony Brook. When Robert was

three years old, my wife and I separated, and later divorced, and since that time she has been in and out of mental institutions. Due to her condition, I have been responsible for bringing up Robert.

Throughout the period of business prosperity, I made a substantial and, I think, successful effort to be both a father and mother to Robert. In 1972, I remarried and adopted my new wife's daughter, Jane, who is three years younger than my son Robert. The following year, my mother passed away, and my eighty-four year old father moved into our apartment and lived with us.

My wife left me in the Spring of 1974 when Adlay went into bankruptcy, and we are presently separated under an agreement which provides that I will continue to support Jane with a percentage of my future income once I am back on my feet. Since I have been without the resources to personally care for my father, and also because he is ill, he is residing at a nursing home where I visit him weekly.

In addition to my business and family life, I have given as much of myself as I could over the years to various charitable and social causes. For example, I have been a member for more than 16 years of the Anti-Defamation League, serving on its National Program Committee. I have also worked with, or raised money for, the Council of Churches, the Urban League, the Conference of Christians and Jews, the National Association of Retarded Children, the Willow Brook Institution, and the Drug Abuse and Narcotics Association. Also, I have been a fund raiser in health related areas such as muscular dystrophy and cancer research. In addition to my charitable activities, for many years I have

played an active role in political campaigns -- local, state, and national -- on behalf of candidates who took strong, progressive positions on social issues.

Circumstances and Events
Preceding the Plea.

Late last April when the indictment was returned, I had no assets and no income, so I requested a court-assigned counsel. A counsel was assigned to me in early May, 1976. He informed me that he had little prior experience in criminal law, but that he would work diligently on my behalf.

From my first conference with my counsel, I informed him that I was innocent of the charges against me, and that I wished to contest them vigorously. For the next six months, up through and including my last contact with him on November 9, 1976, I never deviated from my statement that I was innocent.

At all times, I explained to my counsel that I could not be guilty of any of the allegations because I had no prior knowledge of any fraudulent statements, and never intended that any lending institution with which Adlay dealt be defrauded. I often told my counsel that as chief executive officer of Adlay, I felt I should shoulder the responsibility for any harm to others that resulted from the operation of my business. I have always accepted -- and still assert -- the personal moral responsibility to make whole those who have suffered from Adlay's financial failure.

However, as the criminal laws have been explained to me, I never believed that I had any criminal responsibility because I personally committed no offense. I only regret that my accountant,

who acted in my name, was trusted by me so completely and implicitly. In not watching him more closely and learning more myself about the accounting and financial side of Adlay, I was negligent. In no sense of the word, however, was I criminally liable because I had no prior knowledge of any misstatements.

In the latter part of September, my counsel reported that he was having discussions with the prosecutor on a possible plea bargain. The prosecutor had broached the subject of a plea from the time the indictment was filed, but only now were the overtures taken seriously by my counsel. The close attention paid to a possible plea was due, my counsel indicated, to the fact that he now was of the opinion that my defense of lack of criminal intent was susceptible to challenge at trial. Prior to this time, my attorney and I had looked forward to trial as the ultimate forum for proving that I am not guilty of the crimes charged. Prior to this time, and based upon our conferences and his own analysis and investigation, I had no reason to believe that counsel had any doubt about the viability of my strong defense.

In the face of my attorney's newly stated doubt, I continued to insist upon my innocence. However, in the third week of September, my counsel strenuously advised that I accept a plea to three counts of the indictment. I recall that he sat me down, and gave me the following reasons why I should plead guilty:

1. If I went to trial, I took the risk of conviction on many if not all of the counts and, therefore, I would receive a longer sentence than the sentence I would receive after a plea on three counts.

2. If I went to trial and was convicted of any counts, I would receive a longer sentence than I would after pleading because the government and the judge favored longer sentences whenever the expenditures of substantial time and resources are required for a trial.
3. In Federal Court, my counsel could not directly question prospective jurors, only the judge could, and that we, therefore, would have a very difficult time getting an impartial jury of my peers.
4. The trial would be quite long, the day-to-day strain of it would be very great, and the overall effect upon me would be debilitating.
5. A trial might attract attention with its concomitants of substantial publicity and added notoriety.
6. One of my co-defendants had just pleaded guilty and if I did not plead, that defendant would cooperate with the government and would not be sentenced until after he testified, for the government, at my trial.
7. In addition to the charges in the indictment, the government had evidence that I had destroyed records in an attempt to obstruct the investigation.
8. Finally, he told me either that he had seen evidence or had been given evidence of some letter or memorandum on which I confirmed some prior knowledge of an alleged misstatement in one of the financial statements submitted to the banks.

After reiterating the above reasons why I should plead guilty, my counsel did say that the decision was mine to make. But the effect of his advice was to literally deprive me of my freedom to make a real choice. He told me only the negative factors, and never gave me a balanced picture. For example, I knew that I had

no prior criminal knowledge of misstatements, but my counsel's reference to the government's alleged evidence on this point made the government's case sound stronger than I now know it is. I have reviewed with my new attorney all the documents in our possession, and find no such incriminating document as was described to me by assigned counsel. This analysis of the file supports my contention from the outset, that I did not have prior knowledge of inaccuracies or misstatements in any financial statement and that, therefore, no evidence of such prior knowledge could exist.

Also, the prosecutor's allegation of destroyed documents is absolutely ludicrous. In point of fact, the evidence the government has is based on documents I voluntarily produced. Moreover, my attorney advises me that such alleged tampering with evidence is a federal crime, and if the prosecutor contends that I committed such an offense, why was I not charged accordingly? I respectfully submit that these frivolous, unsubstantiated accusations are nothing more than a vehicle used in an attempt to prejudice the Court.

Nevertheless, my assigned counsel's advice, taken as a whole, amounted to indoctrination. Despite my innocence, the only two alternatives I had were pleading guilty to three counts of the indictment, or going to trial and being convicted on many more counts and receiving a much longer sentence. Circumstances were such as to virtually eliminate a free will determination on my part. I was persuaded in a way which really gave me no alternative. To begin with, I respect the advice of professional me. The importuning of my prior counsel -- which was really much more than legal advice -- and the multiple horrors he painted for me in the event I

stood trial, induced me to consent to enter a guilty plea to three counts.

I gave my consent to enter a guilty plea a few days before pleading. Once the terms of the plea had been finally negotiated, my counsel spent several sessions with me coaching me on the procedure for the allocution. He rehearsed it with me over and over again. Each time he asked me whether I was guilty of a particular charge, I answered by stating that such acts might have taken place but that I felt I was responsible only in the sense that the chief executive officer should take responsibility for insufficient supervision of his employees, and that I had no criminal intent myself, and no prior knowledge to form a criminal intention, to commit the acts in question.

Whenever I answered my counsel's questions in such a manner, he would insist, in substance, "No, no you can't say that. Your plea will not be accepted in that form. The Court will not accept it. You must simply say, 'Yes', and you must say you knew it was against the law, and that you had prior knowledge." We prepared for the allocution again and again, so that I would become resigned to my role.

Sometimes, despite the conditioning, I would shout, "No, that's a lie", to questions such as, "You had prior knowledge that the statements were false, did you not?" My counsel would again explain the unacceptability of my explanations, which amounted to a continued protestation of innocence. We would again review the

proposed allocution until I got it right. On occasion, my counsel would remind me of the long sentence I would be likely to receive if I did not respond in form during the allocution, because my plea would not be accepted and I would be convicted on several counts and sentenced after trial. I recall thinking at one point that if I did not learn properly what to say so that the plea would be accepted, I might face a very long jail sentence because I remembered that at my arraignment, the prosecutor said that he would convict me of every count and "have me put away for eighty years".

The Allocution

The allocution on September 28, 1976 was the most difficult half hour of my life. In many important respects, I did not tell the Court the truth. I am telling the truth now. I did not tell the truth on the allocution because I had been pressured into believing -- despite my persistence in affirming my innocence -- that it was necessary for me to plead guilty, and I knew from my rehearsals and conditioning what it was I had to say in order to successfully plead.

On reading through the transcript of the allocution after the fact, the important elements of it do not appear on the printed page: the extraordinarily long pauses before admitting guilt; the physical support of my counsel who would grab my arm and nod when I was to say, "Yes, sir"; my constant hesitation and virtual inability to say what it was agreed that I would say; and the way my counsel felt required to whisper to me what I was supposed to say. (A copy of the transcript is attached hereto as Exhibit A).

To give the Court one example of my counsel's prompting at the allocution: with respect to count 3 of the indictment, the Court asked me what I did that caused me to say that I was guilty of that charge. Twice I responded that I knew for many years that the inventories were "taken independently" (Ex. A, p. 13). After the second time I said this, my counsel took me by the arm and whispered to me, in substance, "That is not the charge. You must say that the inventories were not done under the supervision of Chaikin and Fialkow." Accordingly, I said, as appears in the transcript, "They were done independently ..." Then I paused, and my counsel whispered the remark quoted above, and I continued, "... but they were not done under supervision of Chapin [sic] and Fail-low."

Another instance of prompting during the allocution itself was my response to the Court's question (Ex. A, p. 14) regarding the purpose of submitting false financial statements to the Empire Bank. I remember that I paused for a long while after the question, not wanting to say what I knew must be said but which I also knew was inconsistent with my knowledge of the fact. My attorney took my arm, and pointed to a line in the indictment under count 3 which read "... the purpose of influencing the action of the Empire Bank," and my counsel indicated to me that that was what I must say. So I responded to the Court's question: "To influence the action of the Empire Bank."

Another significant example of an off-the-record exchange between myself and my counsel occurred when the Court asked me,

with respect to counts 3 and 6 (Ex. A, p. 17), "You knew it was against the law to do what you were doing in each instance, did you not?" I paused, and I whispered to my counsel, "It's a lie." My counsel responded, in effect, "You have to answer the question." So I answered, "Yes, your Honor."

In one or two instances, the face of the transcript itself evidences my inner torture during the allocution. For example, after questions concerning statements relating to inventory, the prosecutor intervened to make a statement to the effect that I was also acknowledging inaccuracies in the financial statements concerning the amount of my income and the amount of my borrowing from Adlay which, the prosecutor stated, I "then and there well knew that [they were] in excess as set forth in the financial statements." (Ex. A, p. 15) The Court then asked, "Is that correct?" I responded, after a long pause, "They were in excess." My answer, however, did not confirm the prosecutor's statement to the effect that I had prior knowledge of the inaccuracies. My response to the Court's question confirmed only that the borrowings were indeed "in excess" of the figures as set forth in the financial statement.

No one chose to clarify or pursued this inadequate response at that time, nor was this issue examined in that portion of the allocution dealing with count 6 where I merely stated that the situation was, "The same occurrence," as count 3 (Ex. A, p. 16).

Another example of an ambiguity on the face of the transcript itself which betrayed the truth -- namely, my lack of prior knowledge or criminal intent -- is my response to the Court's

question concerning count 22, the charge of income tax evasion. The Court inquired (Ex. A, p.21), "Did you know at the time that the amount of taxable income for the year in question for you and your wife" was greater than you reported? I responded, after a long pause, as follows: "I know, your Honor, that the taxable income was more than we reported." The Court realized I had not admitted my guilt, and repeated its question. I paused, my counsel took my arm and nodded, indicating what answer I should give, and, finally, I said, "Yes, your Honor".

My responses throughout the allocution, in point of fact, were programmed and conditioned. They were not the product of my free and unfettered determination to plead guilty. I was made to feel that I had no choice, and that I must waive my right to a jury trial and my right to confront witnesses, or face a long prison sentence.

The Circumstances Following
the Plea Which Led to
This Motion

Immediately after the plea, I had to attend an interview with a probation officer, Mr. James Rocco. I remember that while talking with Mr. Rocco, he inquired whether I thought I was guilty and I told him, as I had wanted to tell the Court, that I believed that I was responsible as the chief executive officer for dereliction in not supervising my accountant, but that was the extent of my blame.

Just a couple of days after taking the plea, I went to visit my counsel and told him that I would like to see a transcript of the allocution because I did not remember everything I said and,

if possible, I wanted to correct any misstatements. He said it would take a couple of weeks to get a copy of the transcript. I recall a discussion about the cost of it and whether or not I had sufficient cash to pay for it.

About two weeks later, my counsel notified me that he had received a copy of the transcript. I went to his office and read it. I was horrified. Of course, the printed page did not contain my pauses, my frustration and the pressure I felt at the time of the allocution. I told my counsel that I wanted to correct the transcript. He said I could not do that without upsetting the guilty plea. I said then that we should withdraw the plea. He replied that there was no ground for such a motion, and that he was not sure that the law would permit a withdrawal. I urged him to check the law.

A week later, an event occurred which finally gave me the determination to insist that the plea be withdrawn. I received a letter from Doris Chaikin, the wife of my deceased accountant. I had not heard from her since Adlay's bankruptcy -- long before the indictment came down -- and I had made no effort to get in touch with her. Mrs. Chaikin wrote that she had seen a newspaper account of my guilty plea, and she asked me to telephone her. I called her the day I got the letter. She told me how awful she felt that I was being punished for what had happened. She told me that her husband died "with a great deal of fear and remorse for the things he had done." She suggested that in the future she and I get together and discuss the whole matter.

Immediately after talking to Mrs. Chaikin, I called my counsel and demanded that the guilty plea be withdrawn. Whether or not Mrs. Chaikin's remark about her husband and other statements of substance which she freely gave to me have any legal weight or effect in a trial I do not know, but her comments reinforced my belief in my own cause, thus reinforcing my determination to be vindicated at trial by proving that I had no criminal responsibility for what had happened.

My counsel said he would look into the question of a motion to withdraw the guilty plea. I spoke to him a couple of days later, but he was not very enthusiastic about the idea. I then realized that I would have to get new counsel of my own choice, even though it meant going into debt to pay for these legal services. Thereafter, I retained Angelo T. Cometa, Esq., of Phillips, Nizer, Benjamin, Krim & Ballon. I asked him to move immediately to withdraw my guilty plea. On the same day, I retained an accountant, Jack M. Portney, to review the relevant documents and to assist in the trial preparation should this motion be successful.

My newly retained counsel sent a letter to the Court on November 3, 1976, the day after I retained him, advising the Court that I would make the instant application. (A copy of that letter is attached hereto as Exhibit B). I have moved as quickly as I could under the circumstances to make this motion.

I respectfully submit that I have shown that my plea was not voluntarily entered. Certainly, I have demonstrated more than "fair and just" reasons for withdrawing my plea. I am innocent, and I have always maintained my innocence.

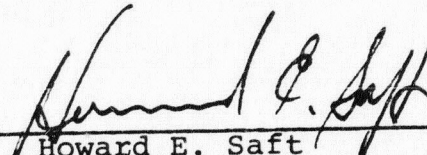
My attorney tells me that he will be prepared to go to

trial at the convenience of the Court and the prosecution, and I cannot envision any prejudice that has been caused or will be caused to the prosecutor as a result of this brief delay. I have a meritorious defense, and I wish that defense to be heard by a jury of my peers.

In concluding, I should state that at no time have I ever thought that my previous attorney acted contrary to what he considered to be my best interests. The professional judgments which Mr. Fox made were motivated by his perception of the evidence and his own analysis of the case taken as a whole. Our perspectives were different and, in essence, this contrast of views preordained my application. At issue here is my state of mind which must be given ultimate weight.

In the event that the Court concludes that something more than a written submission is required to grant my motion, I stand ready to testify under oath concerning my plea, and my readiness and determination to prove my innocence at trial.

WHEREFORE, it is respectfully urged that my motion be granted in all respects.


Howard E. Saft

Sworn to before me this
22nd day of November, 1976.

GERTRUDE BISLER
Notary Public, State of New York
No. 41 6166850 Queens County
Certificate filed in Kings County
Certificate filed in New York County
Term Expires March 30, 1978

RETURN TO COURT REPORTERS
ROOM 803 FOR FILING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

v.

76 Cr. 414

U.S. DISTRICT COURT
S.D.N.Y.
OCT 14 1976

HON. LAWRENCE W. PIERCE,

District Judge

APPEARANCES

DAVID L. FOX, Esq.,
Attorney for Defendant Howard Saft

EXHIBIT A

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2

2 (Case called.)

3 MR. SCHATTEN: Ready for the government.

4 With me is Mr. Peter Salerno of the U.S.

5 Attorney's office.

6 THE COURT: Appearing for the government is

7 Assistant United States Attorney Steven Schatten.

8 Appearing for the defendant is Mr. David Fox and

9 appearing also is the defendant, Howard Saft.

10 What is your wish, Mr. Fox?

11 MR. FOX: Your Honor, at this time defendant

12 Saft wishes to change his plea to a plea of guilty to

13 Counts 3, 6 and 22 of the indictment insofar as Counts 3

14 and 6 charge Mr. Saft with having submitted false state-

15 ments to the bank named in those counts --

16 THE COURT: Knowingly.

17 MR. FOX: Yes, your Honor. -- in that defend-

18 ant knew that the inventory mentioned in those statements

19 had not been supervised by Fialkow and in that the statement

20 fails to reflect that he had received from Adlay sums in

21 excess of the salary and loans shown in the statement.

22 MR. SCHATTEN: Your Honor, the only qualifi-

23 cation I take it Mr. Fox is acknowledging that the sums

24 were substantially in excess of that and that he further

25 pled to Count 22 without qualification.

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2 THE COURT: How about that?

3 MR. FOX: I am sorry; I didn't hear that.

4 THE COURT: Read that back.

5 (Read.)

6 MR. FOX: As to the first portion of that
7 question, yes, your Honor, that they were substantially
8 in excess. With respect to the second part of Mr. Schatten's
9 question there is one qualification and that is that the
10 sum mentioned in the indictment in Count 23 are approx-
11 imately.--

12 MR. SCHATTEN: 22.

13 MR. FOX: 22, I am sorry.

14 THE COURT: Approximately meaning that these
15 are the ballpark figures.

16 MR. FOX: Yes, your Honor.

17 THE COURT: All right.

18 Stand, Mr. Saft.

19 BY THE COURT:

20 Q What is your full name?

21 A Howard E. Saft.

22 Q How old are you?

23 A 53.

24 Q You do read, write, speak and understand
25 English?

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2 A Yes, sir.

3 Q Now, you have received a copy of the indictment
4 in this case in which these charges are set forth, is that
5 correct?

6 A Yes.

7 Q You have read that indictment?

8 A Yes, your Honor.

9 Q And you read the introduction of the indictment,
10 the first portion of it?

11 A Yes, your Honor.

12 THE COURT: The clerk will read Counts 3 and 6
13 and 22 to the defendant and see how he offers a plea to
14 each of those counts.

15 (Clerk reads Count 3.)

16 THE CLERK: You understand the charge on Count 3?

17 THE DEFENDANT: Yes.

18 THE CLERK: How do you offer a plea on Count 3?

19 MR. FOX: With respect to the limitation that
20 we have already set forth, your Honor, Mr. Saft is pleading
21 to knowledge of the falsity of the 1972 statement only.

22 THE COURT: Is it your understanding that that
23 is embraced within the charge enumerated in Count 3?

24 MR. FOX: Yes, your Honor.

25 THE COURT: All right, go ahead.

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2 How do you offer to plea to that, sir?

3 THE DEFENDANT: I plead guilty, sir, to that.

4 THE COURT: All right.

5 Count 6.

6 (Clerk reads Count 6.)

7 THE CLERK: You understand the charge on

8 Count 6?

9 THE DEFENDANT: Yes, sir, I do.

10 THE CLERK: How do you offer to plead to that

11 Count 6?

12 THE DEFENDANT: I plead guilty.

13 (Clerk reads Count 22.)

14 THE CLERK: Do you understand the charge on

15 Count 22?

16 THE DEFENDANT: Yes, sir, I do.

17 THE CLERK: How do you offer to plead to that

18 Count 22?

19 THE DEFENDANT: I plead guilty.

20 THE COURT: Now, Mr. Saft, what do you normally
21 do for a living?

22 THE DEFENDANT: I originated the Adlay Jewelry
23 Corporation and previous to that I was designer repre-
24 sentative of 13 various jewelry factories at 385 Fifth
25 Avenue and before that I was chief executive of Cavalry

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2 Import and Export at 251 West 40th Street.

3 THE COURT: Married or single?

4 THE DEFENDANT: Married. I am separated now,
5 your Honor.

6 THE COURT: Any children?

7 THE DEFENDANT: Two.

8 THE COURT: All ages, please.

9 THE DEFENDANT: Jane is going to be 16 in
10 January and Robbie will be 19 October 28th of this year.

11 THE COURT: What was the highest level of
12 education you obtained?

13 THE DEFENDANT: I went through the Columbia,
14 at that time, Undergraduate School of Business International.

15 THE COURT: Did you obtain a degree?

16 THE DEFENDANT: I obtained a Bachelor of
17 Science.

18 THE COURT: Are you currently or recently
19 been under the care of a psychiatrist?

20 THE DEFENDANT: No.

21 THE COURT: Have you been hospitalized
22 or treated at any recent time for alcoholism or for
23 narcotics addiction or any other type of drug abuse?

24 THE DEFENDANT: No.

25 THE COURT: Are you feeling well today?

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2 THE DEFENDANT: Yes, I am, sir.

3 THE COURT: Have you gone over this indictment
4 with your attorney --

5 THE DEFENDANT: I have, sir.

6 THE COURT: -- after receiving a copy of it,
7 correct?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And he has explained to you what the
10 charges are you are offering to plead guilty to?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And you fully understand these
13 charges?

14 THE DEFENDANT: I do, your Honor.

15 THE COURT: And have you told your attorney
16 everything you know about the case?

17 THE DEFENDANT: Yes

18 THE COURT: Have you held anything back
19 from him with reference to these charges?

20 THE DEFENDANT: Nothing.

21 THE COURT: And you understand that if you
22 did not plead guilty to these charges you would have a
23 right to a speedy and public trial by a jury of twelve
24 people?

25 THE DEFENDANT: Yes, your Honor.

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2 THE COURT: And that upon such a trial you would
3 be presumed innocent unless and until the government
4 established your guilt beyond a reasonable doubt to the
5 satisfaction of all 12 jurors?

6 THE DEFENDANT: Yes.

7 THE COURT: And that upon such a trial you would
8 have the right to confront and cross examine all witnesses
9 called by the government against you?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And that upon such a trial you
12 could remain silent and no inference could be drawn against
13 you by reason of your silence or if you wanted to you could
14 take the stand and testify in your own defense?

15 THE DEFENDANT: Yes.

16 THE COURT: You understand if you wanted to you
17 could have a trial before a Judge without a jury in which
18 the burden would be on the government and you would have the
19 same constitutional rights?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Do you understand that you would
22 have the right of a trial to subpoena witnesses and evidence
23 to your own defense?

24 THE DEFENDANT: Yes.

25 THE COURT: You understand if your offer to

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2 plead guilty to these charges is accepted, you give up
3 these rights with respect to the charges against you and
4 the Court can impose sentence upon you just as if a jury had
5 brought in a verdict of guilty on each of these charges against
6 you?

7 THE DEFENDANT: Yes.

8 THE COURT: You understand upon your plea
9 of guilty to these charges being accepted this Court has
10 the power to impose upon you with respect to Count 3 a
11 term of imprisonment not exceeding two years, a fine --
12 withdrawn.

13 Let me go back again.

14 Do you understand with respect to Count 3 that
15 if your plea of guilty is accepted the Court has the power
16 to impose upon you a term of imprisonment not exceeding
17 two years or a fine not exceeding \$5,000 or both and with
18 respect to Count 6 the Court can impose upon you a term
19 of imprisonment not exceeding two years or a fine not ex-
20 ceeding \$5,000 or both and with respect to Count 22 the
21 Court can impose upon you a term of imprisonment not
22 exceeding five years or a fine not exceeding \$10,000 or both,
23 in short, that you conceivably face a total prison term
24 not exceeding 9 years or a total fine not exceeding \$20,000
25 or both?

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1 THE DEFENDANT: I understand, your Honor.

2 THE COURT: And further with respect to

3 Count 22, do you understand that you may also find in both
4 as a part of the sentence the payment of cost of prosecution?

5 THE DEFENDANT: I understand that.

6 THE COURT: What promises, if any, have been
7 made by way of a plea agreement?

8 First, defendant's attorney.

9 MR. FOX: No promises have been made,
10 your Honor.

11 THE COURT: Mr. Schatten?

12 MR. SCHATTEN: No promises have been made.
13 I fact I informed Mr. Fox in connection with this plea that
14 we would say on the record today in the event the govern-
15 ment did go to trial on this case we would be able to
16 prove all the charges set forth in the indictment beyond a
17 reasonable doubt, except as listed -- as limited by the bill
18 of particulars.

19 I did want to state that on the record at this
20 time; that would include the submission of false 1972 financial
21 statements and the false 1973 financial statement by
22 Saft to all four banks mentioned in the indictment in
23 connection with approximately 4-1/2 to \$5 million in bank
24 loans pursuant to the conspiracy.
25

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2 MR. FOX: Your Honor, I would object to what
3 is a reiteration of the bill of particulars having any
4 consideration before the Court in view of the plea that is
5 now being entered.

6 THE COURT: Objection overruled. It will
7 probably show up in the presentence investigation report
8 anyhow. Have you discussed with Mr. Fox the intention of
9 the government with respect to the remaining counts upon
10 the date of sentence?

11 MR. SCHATTEN: The plea being accepted by
12 the Court and at the time of sentence the government has
13 informed Mr. Fox that it would move to dismiss the
14 other remaining counts that are pending against Mr. Saft
15 and that would be done at the time of sentence.

16 THE COURT: Mr. Saft, have you been induced
17 to offer to plead guilty by reason of any promise, statements
18 or predictions by anybody in the event you will get
19 leniency or consideration by pleading guilty instead of
20 going to trial?

21 THE DEFENDANT: No.

22 THE COURT: Have you been induced to plead
23 guilty by reason of any fear or threats or force or the like?

24 THE DEFENDANT: No, sir.

25 THE COURT: Are you presently under the

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2 influence of any substance which would interfere with your
3 ability to understand what's happening here today?

4 THE DEFENDANT: No.

5 THE COURT: Is there anything you wish to ask
6 the Court about these charges or the consequences of pleading
7 guilty at this time?

8 THE DEFENDANT: No, your Honor.

9 THE COURT: May we understand then that you
10 are offering to plead guilty because you believe you are
11 guilty of these charges?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And the government representative,
14 Mr. Schatten, subject to going to your earlier made
15 statement, that it has sufficient evidence to make a prima
16 facie case as to each of these charges.

17 MR. SCHATTEN: The government represents
18 we will be able to prove these charges beyond any reasonable
19 doubt.

20 THE COURT: Mr. Fox, you know of no legal
21 defense which would prevail if you went to trial and you
22 know of no reason why defendant should not plead guilty to
23 these charges?

24 MR. FOX: That is correct.

25 THE COURT: And you still wish to plead guilty

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2 to these three charges?

3 THE DEFENDANT: Yes.

4 THE COURT: All right.

5 One final thing You have to tell me what it is
6 you say you did that cause o offer the plea of guilty.
7 Let's take Count 3 first.

8 Do you have a copy of the indictment there?
9 Show it to him. First of all I'd like to know when and
10 where and with whom did you do what that causes you to say
11 that you are guilty of that charge set forth in Count 3?

12 THE DEFENDANT: I knew for many years that
13 the inventories that were taken independently --

14 THE COURT: At?

15 THE DEFENDANT: -- in all locations.

16 THE COURT: Of?

17 THE DEFENDANT: Of Adlay and its subsidiaries
18 and Union Chief Division and Robco Division of U.N.M.,
19 United Merchants and Manufacturers.

20 THE COURT: You knew what?

21 THE DEFENDANT: They were done independently
22 but they were not under supervision of Chapin and Fialkow.

23 THE COURT: In other words, if I understand
24 you correctly you submitted certain financial statements
25 to a lending institution and those financial statements

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2 indicated that the inventory at the place you mentioned had
3 been taken under the supervision of the individuals you have
4 mentioned, is that so?

5 THE DEFENDANT: That is so.

6 THE COURT: When in fact you knew that that
7 was not the case and that the inventory had not been taken
8 of those places under the supervision of those named persons?

9 THE DEFENDANT: Correct, sir.

10 THE COURT: Now did this occur from on or
11 about the first day of January 1973 until the first day
12 of 1974 more or less?

13 THE DEFENDANT: That's correct.

14 THE COURT: And to whom were these statements
15 submitted with reference to Count 3?

16 THE DEFENDANT: To the Empire Bank.

17 THE COURT: Where is that located?

18 THE DEFENDANT: New City, New York.

19 THE COURT: And also in Newburgh, New York?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And for what purpose were those
22 submitted?

23 THE DEFENDANT: To influence the action of the
24 Empire Bank.

25 THE COURT: In doing what?

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2 THE DEFENDANT: Lending --

3 THE COURT: A substantial amount of money?

4 THE DEFENDANT: -- a substantial amount of
5 money.

6 THE COURT: Is it conceded by both sides the
7 bank in question was a federally insured bank or loan lending
8 institution?

9 MR. SCHATTEN: Yes, your Honor.

10 MR. FOX: Yes, your Honor.

11 THE COURT: All right.

12 Anything more with reference to that count?

13 MR. SCHATTEN: Yes. Mr. Saft I understood was
14 further acknowledging the statement was further false in that
15 it showed incorrectly that he had derived a salary of only
16 \$52,000 and borrowing of approximately \$19,000 from the
17 company whereas in truth and fact as he then and there well
18 knew that Mr. Saft was fully aware that his salary and his
19 borrowing was substantially in excess as set forth in the
20 financial statement.

21 THE COURT: Is that correct?

22 THE DEFENDANT: They were in excess.

23 THE COURT: Now we will move to Count 6.

24 Turn to that, please.

25 What is it that occurred with respect to

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2 Count 6 that you say causes you to be guilty of the
3 violation of federal law here? Take a look at it.

4 THE DEFENDANT: Yes. The same occurrence.

5 THE COURT: The same?

6 THE DEFENDANT: Yes.

7 THE COURT: Did these occurrences take place
8 between the first day of January '73 up to and including the
9 first day of January '74 more or less?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And to whom were such similar
12 statements made with reference to this count?

13 THE DEFENDANT: To the National Bank of North
14 America, New York, New York.

15 THE COURT: And is it conceded by both sides
16 this is a federally insured bank or lending institution?

17 MR. FOX: Defendant so concedes.

18 MR. SCHATTEN: The government so concedes
19 it is a bank, deposits which were federally insured.

20 THE COURT: For what purpose was false financial
21 statements knowingly made to this bank?

22 THE DEFENDANT: Your Honor, to influence the
23 action of that bank in lending a sum of money to Adlay
24 Jewelry and subsidiaries.

25 THE COURT: A substantial sum?

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2 THE DEFENDANT: Yes.

3 THE COURT: In excess of 100,000 in each
4 instance?

5 THE DEFENDANT: Yes.

6 THE COURT: In each of these instances with
7 reference to the National Bank of North America referred
8 to in Count 6 and the Empire Bank referred to in Count 3
9 you knew what you were doing in each instance, did you not?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: You knew it was against the
12 law to do what you were doing in each instance, did you
13 not?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: And you intended to do it at the
16 time you did in each instance, is that not so?

17 THE DEFENDANT: Yes.

18 THE COURT: All right, let's move on.

19 Anything further now?

20 MR. SCHATTEN: I would just represent to
21 the Court merely that the amounts of the loans are as
22 stated in the indictment, \$1.2 million in connection with the
23 Empire Bank loan and more than \$1 million in connection with
24 the National Bank of North America loan.

25 THE COURT: Were the loans actually made,

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2 Mr. Saft, in each instance?

3 THE DEFENDANT: At Empire Bank although the
4 indictment statement one million two, they had a certificate
5 of deposit of \$180,000.

6 THE COURT: You mean as collateral?

7 THE DEFENDANT: That was there as part of the
8 one million two so they actually lent the corporation
9 \$1,020,000 and the other there was a \$200,000 certificate
10 of deposit at National Bank.

11 THE COURT: All right, let's move to Count 22.

12 First of all --well, you tell me what is it that
13 you say you did or didn't do that caused you to plead
14 guilty to that count?

15 THE DEFENDANT: Well, in essence it says that
16 I had more taxable income than I showed on the account.

17 THE COURT: Well, first of all, we're talking
18 about the calendar year 1973. Is that right?

19 THE DEFENDANT: Yes.

20 THE COURT: And is it true that during that
21 year you were married and you filed along with your wife
22 a joint income tax return?

23 THE DEFENDANT: Yes, 'sir.

24 THE COURT: And is it true that in that return
25 for that year -- and you filed that on or around April 15th

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2 of '74, is that correct?

3 THE DEFENDANT: Yes.

4 THE COURT: And that was in the Southern
5 District of New York here and is it so that at that time
6 you stated in your return that you and your wife had tax-
7 able income amounting to just under \$34,000 for the year 1973
8 and that the amount of income tax due and owing on
9 that amount was between 9 and \$10,000, to wit, \$9,626.20.
10 Did you file a return that said that?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Now, was that true?

13 THE DEFENDANT: No, your Honor.

14 THE COURT: And in fact the taxable income for
15 you and your wife for the taxable year in question is said to
16 have been in excess of \$140,000. Is that true?

17 THE DEFENDANT: We have not been able to
18 make a determination yet of the actual figures, your Honor.

19 THE COURT: Well, let's see.

20 I don't have to have an exact amount. I just
21 have to know whether the amount involved was a substantial
22 amount -- that is, substantially higher than the 33, \$34,000.

23 THE DEFENDANT: Yes.

24 THE COURT: Was it at least \$75,000 taxable in-
25 come?

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2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: And did you therefore owe the
4 United States Government in income tax at least 20 or more
5 thousand dollars than this 9600 that you say was tax due?

6 THE DEFENDANT: Yes.

7 THE COURT: All right. I find that is a
8 substantial amount.

9 MR. SCHATTEN: Your Honor, may I ask two
10 questions or ask the Court to ask two questions; the first
11 question being at the time that Mr. Saft filed the tax
12 returns, did he know that those tax returns were false
13 and fraudulent.

14 THE COURT: I am not finished.

15 MR. SCHATTEN: I apologize to the Court. The
16 only question I put to the Court is as his lawyer stated,
17 was he aware at the time the tax return was filed his true
18 taxable income was approximately \$140,000.

19 THE COURT: The Court makes a finding, first
20 of all, that the amount of income tax due and owing for
21 the tax year 1973 was substantial. Now tell me your
22 purpose in filing for the lower amount rather than the
23 higher amount? Was it an attempt on your part to evade
24 or defeat the tax fully due, was that your primary purpose
25 for that matter?

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2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: Now, did you know at the time --
4 withdrawn.

5 Did you not know at the time that the amount
6 of the tax -- withdrawn.

7 Did you not know at the time that the amount
8 of taxable income for the year in question for you and your
9 wife was somewhere in the vicinity of \$140,000?

10 THE DEFENDANT: I know, your Honor, that the
11 taxable income was more than we reported.

12 THE COURT: Did you know at the time that the tax-
13 able income for the year in question for you and your wife
14 was in excess of \$75,000? We have been through this once.

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Did you not know at the time that the
17 taxable income due and owing was in excess of ninety-eight
18 twenty-six and indeed some ten to twenty or more thousand
19 dollars in excess?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: And did you intend to do what you
22 did at the time?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And did you know it was a violation
25 of the law to do what you did at the time?

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2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right.

4 Is there anything further?

5 MR. SCHATTEN: Nothing from the government,
6 your Honor.

7 THE COURT: All right.

8 The plea of not guilty heretofore interposed
9 with respect to Counts 3, 6 and 22 is withdrawn in each
10 instance and the plea of guilty to Counts 3, 6 and 22 is
11 acceptable with respect to each of those counts and the
12 clerk is directed to enter those pleas.

13 A presentence report is requested.

14 Counsel will make his client available to the
15 Probation Department. Further, counsel and the government
16 are authorized to read the presentence investigation report
17 but you should do so at the probation office prior to the
18 time set for sentence. Do not come to chambers to read
19 the presentence report. Read it at the Probation Depart-
20 ment. If there are any corrections or additions you
21 can make them right there in the Probation Department at
22 the time.

23 We will set this matter down for sentence on
24 October 28th at 4:30.

25 MR. FOX: Your Honor, if we may, I believe

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2 that date particularly I will not be available, but in
3 any event, may we have an additional period of time?
4 I request an additional three weeks to the middle of the
5 following month for the purposes -- particularly with
6 respect to the question that the Court will be considering
7 at that time, I will need time to make submissions.

8 THE COURT: Well, we have a time limit imposed
9 by the rule, 45 days. Is that so, Mr. Schatten?

10 MR. SCHATTEN: My understanding is the same
11 as the Court's.

12 THE COURT: If you want to take 43 or 44 days, that
13 is all right with me.

14 MR. FOX: That would be a great help to us.

15 THE COURT: Now the bail question is no change?

16 MR. SCHATTEN: None, your Honor.

17 THE COURT: Same bail.

18 Let's pick a date. What about November 9th,
19 4:30, Saft for sentence, same bail? Now I have a couple
20 of questions.

21 First of all, with reference to the submission
22 under the Criminal Justice Act of an authorization to pay for
23 expert accounting services, I have signed one or more of
24 these already. Why should I sign a thousand dollar bill
25 for accounting services in light of the developments today?

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2 MR. FOX: Your Honor, the reason for that
3 submission is the following, initially when I made an
4 application for such services I represented to the Court
5 that I was not authorizing more than \$300 for such services.
6 I then at approximately a month and a half ago submitted
7 an application for additional authorization, was orally
8 informed by your office it was approved. My accountant
9 in fact incurred substantial periods of additional time.
10 I do not think he has incurred the full thousand hours of
11 time.

12 All I was trying to do here is cure my own
13 negligence in not submitting that authorization when your
14 office instructed me to.

15 THE COURT: All right. What I wish to do
16 here, I am not quite sure how to handle it, so to return
17 it -- I will give it to the clerk and the clerk will return
18 it to you. You can correct this, probably downward, and then
19 we will take up the question, but you are correct.
20 It was a recitation of the sequence, and once you have
21 corrected it I can then sign it and send it on.

22 MR. FOX: I will do that, your Honor.

23 THE COURT: Now, the next thing is -- that
24 finishes, I believe, the Saft matter and I will ask Mr.
25 Schatten to tell me what's going to happen with respect

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2 to Mr. Fialkow.

3 MR. SCHATTEN: Your Honor, I don't know
4 right now or I may well be in a position to get back to the
5 Court possibly in a day or two.

6 I gather we have a tentative trial date of
7 October 5th subject to the possibility we may have to
8 October 12th.

9 THE COURT: The likelihood is this will go
10 October 5th. If somewhere along the line I have to inter-
11 rupt this in order to commence another trial we may be
12 trying one portion in the morning and one portion in the
13 afternoon -- the other case in the afternoon but this
14 case will go everyday October 5th.

15 MR. SCHATTEN: I will get to the Court as
16 soon as possible.

17 THE COURT: Thank you.

18 MR. FOX: Thank you, your Honor.

19 - - -
20 I (We) hereby certify that the foregoing
21 is a true and accurate transcript, to the best
22 of my (our) skill and ability, from my (our)
23 stenographic notes of this proceeding.

24 *Murray Neutsch*

25 Official Court Reporter
U. S. District Court

A

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November 3, 1976

Hon. Lawrence W. Pierce
United States District Judge
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Foley Square
New York, New York 10007Re: USA v. Howard E. Saft
76 CR 414

Dear Judge Pierce:

Yesterday Howard E. Saft consulted with this firm and has retained us for the purpose of prosecuting a motion to withdraw his plea to three counts of the above-captioned indictment.

Mr. Saft has advised us of his innocence and wishes to proceed to trial of all charges in the indictment.

We have just received voluminous portions of his file and have yet to confer with David Fox, our predecessor counsel. We will need a period of time in order to adequately prepare a motion addressed to the plea and, therefore, request Your Honor's indulgence in this regard by adjourning the date of sentence. We anticipate being able to serve and file our motion papers by November 23rd.

Respectfully,

Angelo T. Cometa

Angelo T. Cometa

ATC:gc

(cc: Steven A. Schatten
Asst. United States Attorney)

(by hand)

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

76 CR 414 (LWP)

-against-

AFFIDAVIT OF
JACK M. PORTNEY

HOWARD E. SAFT, et al.,

Defendants.
-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JACK M. PORTNEY, being duly sworn, deposes and says:

I am a certified public accountant, retained by Howard E. Saft, a defendant herein, on November 2, 1976, to review the documents involved in this case. I submit this affidavit in support of Mr. Saft's motion to withdraw his guilty plea.

I attended the New York University School of Commerce from which I graduated in 1960. I have been an accountant since 1960 and a certified public accountant since 1967. I am the principal in an accounting firm under the name of Jack M. Portney with offices in Fort Lee, New Jersey. For many years, my firm has provided a great range of accounting services, including auditing, business management services and investigative accounting.

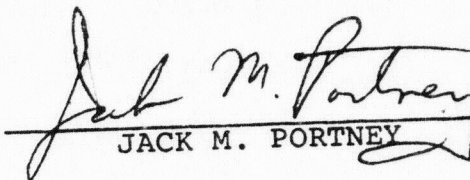
In the brief time since being retained by Mr. Saft, I have reviewed the indictment, various legal memoranda of past and present counsel for Mr. Saft and counsel for the government; I have reviewed the report of M. A. Libien, C.P.A., of Singer and

Libien, the court-appointed accountants; I have discussed at great length Mr. Saft's past business practices and, in particular, the financial statements involved in this case; and I have conferred with Mr. Saft's retained counsel, Angelo T. Cometa, Esq. It is my initial judgment from this summary review of some of the relevant documents, that in the ordinary course of business, a businessman as occupied as Mr. Saft was with the day to day operation and details of opening new stores and supervising three dozen or more retail outlets, would not have a detailed or really substantial knowledge of the contents of financial statements prepared by an accountant long associated with that business. Furthermore, even if acquainted in a general way with the statements, a businessman in Mr. Saft's circumstances would not comprehend the professional decisions and the kind of accounting machinations that apparently took place in the instant case.

Moreover, in my discussion with Mr. Saft, he has without qualification asserted to me that he is innocent of all the allegations in the indictment, including those to which he pleaded guilty. He has, indeed, said that he was "negligent" or "derelict" not to have learned more about the accounting side of his business and to have trusted so completely in his accountant, Leon Chaikin. However, he has said that he had no prior criminal knowledge or criminal intent, and my initial investigation confirms that assertion.

If, in the coming weeks, more thorough analysis further confirms my initial impression, and if Mr. Saft's attorneys so request, I expect to testify as an expert witness on the trial of this

matter on the issues of both the accuracy of the financial statements in question and Mr. Saft's prior knowledge or understanding of those statements.


JACK M. PORTNEY

Sworn to before me this
22nd day of November, 1976.


GERTRUDE FISHER
Notary Public for the State of New York
No. 41-6121-000 Queens County
Certificate filed in Kings County
Certificate filed in New York County
Term Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----		:
UNITED STATES OF AMERICA,	:	76 CR 414 (LWP)
-against-	:	
HOWARD E. SAFT, et al.,	:	AFFIDAVIT OF
Defendants.	:	<u>ANGELO T. COMETA</u>
-----		:

STATE OF NEW YORK)
 ss.:
COUNTY OF NEW YORK)

ANGELO T. COMETA, being duly sworn, deposes and says:

I am an attorney-at-law, and a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for the defendant Howard E. Saft. I submit this affidavit in support of Mr. Saft's motion pursuant to Rule 32(d) Federal Rules of Criminal Procedure, to withdraw the plea of guilty which was interposed on September 28, 1976.

I was retained by the defendant on November 2, 1976. On that same day, Mr. Saft related to me, in some detail, all the circumstances surrounding the taking of the plea. At the outset Mr. Saft advised me that he is innocent of all of the charges contained in the indictment handed down against him and that, had it not been for the persuasive influence exerted upon him by his previous counsel he would not have pleaded guilty to Counts 3, 6 and 22 of the

instant indictment.

My initial investigation of this case including a review of many of the documents contained in the file transmitted to my office by my predecessor counsel, has led to my personal conclusion that there is a meritorious defense available to the defendant with respect to all of the charges, including the three counts to which he pleaded guilty.

Should the Court grant Mr. Saft's motion and the plea be subsequently vacated, no prejudice will be worked upon the interests of the Government for reasons more fully set forth in our accompanying memorandum of law.

In the event that the motion is granted we will be ready to try the matter as expeditiously as possible (the Court has already suggested a trial date mutually satisfactory to both the Government and the defense).

I would like to comment briefly with respect to the accompanying affidavit of David L. Fox, Esq., Mr. Saft's previous attorney. It is submitted that this affidavit is in no material way -- in conflict with the sworn statement of Mr. Saft, but rather fully corroborates the defendant's principal assertions -- particularly in the area of Mr. Saft's consistent and unswerving protestations of innocence.

It should be clear from the entire context of Mr. Fox's statement that, notwithstanding Mr. Saft's insistence of innocence, he was prepared to allocute untruthfully in order to obtain what he was persuaded to believe was the lesser of two evils. The particulars of the discussions between Messrs. Saft and Fox are set forth in detail in the Saft affidavit. The facts make it clear that, given Mr. Fox's persuasive influence upon the client, the defendant's ability to make a free will determination on the issue of guilt was totally destroyed. When Mr. Saft allocuted on September 28, 1976 in the face of his continued refusal to admit guilt to his counsel, both he and his counsel knew that Saft did not believe he was guilty.

WHEREFORE, it is respectfully urged that the defendant Saft's motion be granted in all respects.

Angelo T. Cometa
Angelo T. Cometa

Sworn to before me this

23rd day of November, 1976.

GERTRUDE EISLER
Notary Public, State of New York
No. 41-6166250 Queens County
Certificate filed in King County
Certificate filed in New York County
Term Expires March 30, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,	:	76 CR 414 (LWP)
-against-	:	AFFIDAVIT OF
	:	DAVID L. FOX
HOWARD E. SAFT, et al.,	:	
Defendants.	:	

-----x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

DAVID L. FOX, being duly sworn, deposes and says:

I am an attorney and former counsel to Howard E. Saft, the defendant herein. I submit this affidavit at the request of Mr. Saft, on his motion, pursuant to Rule 32(d) Federal Rules of Criminal Procedure, to withdraw his guilty plea.

I was assigned to represent Mr. Saft on May 5, 1976, by Magistrate Harold J. Raby, pursuant to the Criminal Justice Act, 18 U.S.C. section 3006A. On or about November 2, 1976, Mr. Saft advised me that he had retained new counsel, Angelo T. Cometa, Esq. On November 9, 1976, I executed a Consent to Change Attorneys, and was formally relieved of my assignment by this Court.

In the six months that I represented Mr. Saft, he consistently stated to me that he believed himself innocent of criminal responsibility as to all the charges in the instant indictment.

However, he did reveal to me certain facts that conflicted with his affirmations of innocence.

Throughout my six month representation of Mr. Saft he insisted that his accountant Leon Chaikin, one of the co-conspirators, was primarily responsible for the criminal acts alleged in the indictment. He berated himself for being "negligent" and "derelict" in trusting Chaikin so completely, while repeatedly denying criminal intent to commit or prior criminal knowledge of any of the offenses with which he was charged.

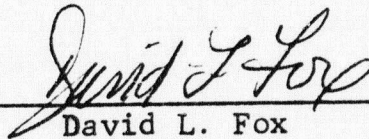
During the course of representing Mr. Saft, I obtained discovery from the government of numerous documents and interviewed a number of potential witnesses. In September, 1976, additional disclosure by the government together with my own investigation, revealed certain new information which conflicted with Mr. Saft's assertions. I reviewed these materials with Mr. Saft at length, and advised him that in my professional judgment there were substantial risks that the government would prevail upon a trial with respect to a substantial number of the charges against him.

Specifically, the information I had obtained which conflicted with Mr. Saft's assertions caused me to conclude that, if Mr. Saft went to trial, the government might well prevail on

Counts 3, 6 and 22 of the indictment. I so advised Mr. Saft and asked him if he wished to consider entering a plea of guilty to one or more of those three charges. Mr. Saft instructed me to pursue serious plea negotiations with the prosecutors. However, because of his continuing denial of criminal responsibility, he instructed me to seek an "Alford plea", under which he could enter a plea of guilty without expressly affirming his guilt.

The prosecutors rejected Mr. Saft's request to enter an Alford plea. I so advised Mr. Saft, and further advised him that, in that event, he should not enter a plea of guilty, unless he believed himself to be guilty.

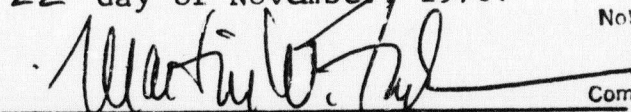
Mr. Saft rejected my advice, and insisted that he would plead guilty to the three counts. We discussed this question at considerable length and I advised him that he would be required, upon allocution, to admit his guilt to these charges. He said that he was prepared to allocute to these charges. For my own part, just prior to the entry of the plea, I decided that under ABA Standards Relating to the Administration of Justice, the Defense Function, Section 5.3, the information I had obtained which conflicted with Mr. Saft's assertions of innocence, permitted me to participate in Mr. Saft's entry of his plea.


David L. Fox

Sworn to before me this

22 day of November 1976.

MARTIN W. FELCHER
Notary Public, State of New York
No. 031184210
Qualified in Bronx County
Commission Expires March 30, 1977.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

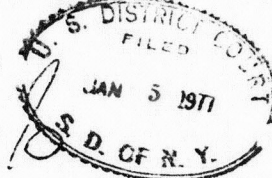
HOWARD E. SAFT, et al.,

Defendants.

AFFIDAVIT IN
OPPOSITION

76 Cr. 41 (LWP)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)



STEVEN A. SCHATTEN, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and as such I am familiar with the above-captioned matter. I make this affidavit in opposition to the motion of defendant Howard E. Saft under Rule 32(d) of the Federal Rules of Criminal Procedure to vacate his plea of guilty to Counts 3, 6 and 22 of Indictment 76 Cr. 414 (LWP).

2. The Government strenuously urges, for the reasons set forth here and in our accompanying memorandum, that Saft's papers on their face do not set forth any basis for granting the Rule 32(d) motion, and the Court should deny the motion on its face. However, if the Court should desire to consider the factual allegations underlying Saft's motion, the Government strongly urges that the Court hold a hearing at which, inter alia, Mr. Saft and David L. Fox, Esq., will be called upon to testify, and that, in view of Saft's papers which clearly constitute a waiver of Saft's attorney-client privilege, the Court should determine that Mr. Fox should be free to confer with the Government, furnish

pertinent documents and give testimony on all of the issues raised by Saft's papers.

3. While the Government's response to Saft's affidavit in support of his motion should be confined solely to the issue of whether Saft's plea of guilty was voluntarily and knowingly made, the inaccuracies, misrepresentations, lies and other devices and stratagems he has employed to conceal the truth must be set forth.

I. Background

4. In order to put matters in the proper perspective, a brief history of this case is perhaps in order. In or about May 1975, Mr. Saft -- whom this investigation discloses to be an extremely shrewd, sophisticated and politically well-connected individual -- was served with a grand jury subpoena and asked for any and all books and records of Adlay Jewelry and its subsidiaries in his possession, custody and control. At the time, and from then on until his arraignment on the indictment about one year later on April 29, 1976, Mr. Saft was represented by the well known firm of Louis Bender, Esq., (Sandor Frankel, Esq., of counsel).

5. Saft's affidavit states that "the evidence the government has is based on documents I voluntarily produced." As the transcript of Saft's grand jury testimony indicates (a copy of which is attached hereto as Exhibit 2), he produced merely six grand jury exhibits all relating entirely to transactions between Executive Jet Airlines and Adlay Jewelry, Inc. (in connection with which Saft had previously been investigated for alleged illegal campaign contributions by the Watergate Special Prosecutor's Office).

As is obvious from the voluminous documents which comprise the Government's case, the Government had to go to many sources, other than Mr. Saft, even to obtain records of Adlay Jewelry and its subsidiaries.

6. Moreover, although Saft argues that he is innocent and has consistently asserted his innocence, the fact of the matter is that Saft invoked his privilege against self-incrimination in the Grand Jury and when another Grand Jury (which voted on the indictment) requested Mr. Saft to appear and testify, he declined to do so. Mr. Saft, acting on the advice of counsel, was surely proceeding in accordance with his constitutional rights in taking these positions; however, these facts are mentioned to put Saft's claim that he has "consistently asserted [his] innocence" in its proper setting.

7. Moreover, Saft states that he never admitted his guilt to the probation officer (Saft Aff., p. 2) and that he told the probation office that he believed he was responsible as chief executive officer for dereliction in not supervising his accountant (but that was the extent of his blame). (Saft Aff., p. 17). The probation officer's report reveals that Saft declined to make any oral statements regarding the offense, but said he would submit a written statement to the Court prior to the sentencing date. This suggests that Saft's current ploy--to attempt to induce the Court into believing his plea was a sham--may have been afoot at least as early as the very date of his guilty plea, and perhaps as early as the plea discussions when the Government was furnishing to Saft's counsel, Mr. Fox, specific documents and at times the substance of testimony on the understanding that the plea discussions were being conducted in good faith.

8. Mr. Saft states that, at the arraignment in **A61** April, the prosecutor, i.e., your deponent, "said that he would convict me of every count and 'have me put away for eighty years.'" Saft further states that this was on his mind at the time that he entered his guilty plea. Of course, this is merely one more false statement. As the annexed transcript of the arraignment makes clear (see Exhibit 3 annexed hereto), your deponent never made any such statement.* Moreover, at the arraignment, Mr. Saft was represented by Mr. Bender's law firm and, even if the prosecutor had made any such statement--which he did not--Saft would surely have promptly cleared up any such misimpression by conversation with his counsel. In any case, in entering into the plea agreement, one of the appropriate practical inducements, which was negotiated vigorously ~~by~~ by Mr. Saft's counsel, Mr. Fox, was that the maximum exposure was reduced from 80 years to nine years.

9. As the Court is obviously well aware from the Indictment and the Government's Sentencing Memorandum,** the charges set forth in the Indictment and the underlying evidence demonstrate a massive scheme dominated by defendant Saft and co-conspirator Chaikin to submit to four banks false financial statements, to obtain approximately five million dollars in bank loans and to conceal the true state of affairs at Adlay Jewelry and its subsidiaries, including

* What the prosecutor did say was that, in view of (i) Mr. Saft's Swiss business connections, his trips to the Caribbean, lack of current business roots in the community and, as recently as December 1975, business trips to England and Greece, and (ii) "the fact Mr. Saft is facing 80 years in prison as well as substantial fines on the charges, we think the [requested] bail is reasonable under the circumstances." (Tr. of 4/29/76, p. 3)

** A copy of the Government's Sentencing Memorandum is annexed as Exhibit 1.

A 62
the fact that Saft was looting Adlay out hundreds of thousands of dollars. Saft's "Shingle Style", custom-built East Hampton residence -- which Saft acknowledges was his asset (Saft Aff. p. 4) -- had \$200,000 of the funds of Chareen Wholesale Jewelers, an Adlay subsidiary, expended thereon. These funds were falsely disguised and concealed as a corporate asset of Adlay, "Leasehold Improvements, Furniture & Equipment" on Adlay's financial statements.

10. As the Government's evidence will demonstrate and as the indictment alleges, Saft was looting Adlay and its subsidiaries in various other ways, as well. For example, the indictment alleges that the financial statements show that Saft owned Adlay Jewelry only \$19,339 as of December 31, 1973, whereas the amount that Saft in fact owed Adlay was approximately \$248,000 (without taking into account the \$200,000 expended on his East Hampton residence and improperly charged to "Leasehold Improvements, Furniture and Equipment"). Moreover, Adlay had a program of selling jewelry to its employees at discount prices, principally for cash; the Government's proof reveals that a substantial amount of these cash sales were siphoned out of Adlay by Mr. Saft.

Regardless of whatever allegations, statements, innuendoes or references are set forth in Saft's affidavit against Leon Chaikin, there is no doubt whatsoever that the prime beneficiary of this five million dollar fraud scheme was Mr. Saft. Thus, Mr. Saft -- not Mr. Chaikin -- derived approximately \$200,000 from the Adlay subsidiary to remodel his East Hampton residence. Mr. Saft -- not

Mr. Chaikin -- had borrowed approximately \$248,000 from Adlay, as of the end of 1973 while the financial statements delivered to and/or discussed by Mr. Saft with banks and other lending institutions showed borrowings by Saft of only \$19,000. And Mr. Saft, not Mr. Chaikin, was looting Adlay out of various cash proceeds of Adlay's wholesale sales to its employees and others.

II. Circumstances and Events
Preceding the Plea

11. As previously set forth in my letter to the Court, dated December 1, 1976,* David L. Fox, Esq., advised your deponent on November 26, 1976 that, without going into specifics, Saft's affidavit was incorrect in material respects. Mr. Fox has further informed me that his entire conduct during his relationship with Mr. Saft was proper in all respects. And, in his affidavit, sworn to December 7, 1976, Mr. Fox sets forth "Mr. Cometa's refusal to permit [him] to confer with the Government" as the reason why he is unwilling to furnish a detailed affidavit (Exhibit 4). Mr. Fox's affidavit of December 7, 1976 further manifests his desire to file a further affidavit "to set the record straight." Entirely apart from the foregoing, a reading of Mr. Saft's affidavit, sworn to November 22, 1976, and Mr. Fox's affidavit of the same date, reveal totally differing versions of the facts and circumstances preceding the plea.

12. Thus Mr. Fox states that "[Saft] did reveal to me certain facts which conflicted with his affirmations of innocence." Saft however states:

* A copy of my letter to the Court, dated December 1, 1976, is annexed as Exhibit 5.

SAC: [unclear]
12-139

"From my first conference with my counsel, I informed him that I was innocent of the charges against me, and that I wished to contest them vigorously. For the next six months, up through and including my last contact with him on November 9, 1976, I never deviated from my statement that I was innocent."

Neither Mr. Cometa nor Mr. Saft apparently saw fit to ask Mr. Fox to set forth in his affidavit what the "conflicting facts" are; Mr. Saft chose to ignore the "conflicting facts" in his affidavit; and Mr. Cometa has up to this point, by his improper directions to Mr. Fox not to confer with the Government,* successfully endeavored to prevent Mr. Fox from revealing those "conflicting facts" to the Government and the Court.

13. Moreover, Mr. Fox's November 22 affidavit states that:

"I reviewed these materials [i.e., numerous documents and information received from the Government] with Mr. Saft at length, and advised him that in my professional judgment there were substantial risks that the government would prevail upon a trial with respect to a substantial number of the charges against him. Specifically, the information I had obtained which conflicted with Mr. Saft's assertions caused me to conclude that, if Mr. Saft went to trial, the government might well prevail on Counts 3, 6 and 22 of the indictment. I also advised Mr. Saft and asked him if he wished to consider entering a plea of guilty to one or more of those three charges. Mr. Saft instructed me to pursue serious plea negotiations with the prosecutors."

Without quoting at length Mr. Saft's version of the same events, suffice it to say that it presents a vastly different picture which can be summarized by Saft's statements as follows:

* The ABA Project on Standards for Criminal Justice, The Defense Function, Section 4.3(c) states:

"A lawyer should not obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise, other than a client, to refuse to give information to the prosecutor or counsel to co-operate."

See also cases in my letter to the Court of December 1, 1976.

"Circumstances were such as to virtually eliminate a free will determination on my part. I was persuaded in a way which really gave me no alternative. To begin with I respect the advice of professional me[n]. The importuning of my prior counsel - which was really much more than legal advice -- and the multiple horrors he painted for me in the event I stood trial, induced me to consent to enter a guilty plea to three counts." (Saft Aff. p. 12).

Mr. Cometa apparently never showed this portion of the Saft Affidavit to Mr. Fox, prior to submitting Mr. Fox's affidavit and, by his directions to Mr. Fox, prevented the Government from rebutting Saft's allegations in more detail than is presently set forth in the Fox Affidavit attached to the Government's motion and in Fox's statements to the Government.

14. Mr. Fox's affidavit then states:

"[Saft] instructed me to seek an Alford plea, under which he could enter a plea of guilty without expressly affirming his guilt. The prosecutors rejected Mr. Saft's request to enter an Alford plea. I so advised Mr. Saft, and further advised him that, in that event, he should not enter a plea of guilty, unless he believed himself to be guilty." (Emphasis supplied)

At no point in Saft's affidavit does he deny having received that advice from his counsel. Indeed, significantly, Saft's affidavit acknowledges that Fox:

"did say that the decision [whether to plead guilty] was mine to make."

(Saft Aff. p. 11).

15. Fox's affidavit states:

"We discussed this question [of Saft's pleading guilty to three counts] at considerable length and I advised him that he would be required, upon allocation, to admit his guilt to these charges. He said he was prepared to allocate to these charges."

SAS-brj
12-939

Saft himself states:

"I gave my consent to enter a guilty plea a few days before pleading."
(Saft Aff. p. 13)

16. Saft then goes into some detail in describing the meetings with Mr. Fox concerning the allocution. For example, Saft states:

"Each time [Fox] asked me whether I was guilty of a particular charge, I answered by stating that such acts might have taken place but that I felt I was responsible only in the sense that the chief executive officer should take responsibility for insufficient supervision of his employees, and that I had no criminal intent myself, and no prior knowledge to form a criminal intention, to commit the acts in question."

"Whenever I answered my counsel's questions in such a manner, he would insist, in substance, 'No, no you can't say that. Your plea will not be accepted in that form. The Court will not accept it. You must simply say, 'Yes', and you must say you knew it was against the law, and that you had prior knowledge.' We prepared for the allocution again and again, so that I would become resigned to my role." (Ibid.)

And Saft's affidavit reaches rhetorical heights:

"Sometimes, despite the conditioning, I would shout, as follows: 'No, that's a lie', to questions such as, 'You had prior knowledge that the statements were false, did you not?' My counsel would again explain the unacceptability of my explanations, which amounted to a continued protestation of innocence." (Ibid)

Fox's affidavit simply states:

"For my own part, just prior to the entry of the plea, I decided that under ABA Standards Relating to the Administration of Justice, the Defense Function, Section 5.3, [*] the information I had obtained which conflicted with Mr. Saft's assertions of innocence, permitted me to participate in Mr. Saft's entry of his plea."

The applicable head note to the ABA Standard Relating to the Administration of Justice, the Defense Function, Section 5.3 provides as follows:

"If the accused discloses to the lawyer facts which negate guilt and the lawyer's investigation does not reveal a conflict with the facts disclosed but the accused persist in entering a plea of guilty, the lawyer may not properly participate in presenting a guilty plea, without disclosure to the court."

17. It would take an exceedingly difficult, if not impossible, exercise in sophistry to reconcile Mr. Saft's and Mr. Fox's account. Certainly, in view of the facts that Mr. Cometa did not, for whatever reason, show Mr. Fox the affidavit of Mr. Saft, prior to filing, along with Mr. Fox's statements to the Government and in his December 7 affidavit, make the situation highly suspect.

18. Given Mr. Cometa's successful efforts, to date, to block Mr. Fox from conferring in detail with the Government, from filing a detailed affidavit setting forth his version of the facts or submitting to the Government or the Court any relevant documents, memoranda and notes relating to interviews and other conversations with Mr. Saft in connection with the circumstances culminating in Saft's guilty plea, this Court should hold a hearing and get full-blown accounts of the events from Mr. Saft and Mr. Fox -- unless, as we urge, the Court decides to reject Saft's motion on its face.

III. The Guilty Plea

19. After several weeks of vigorous negotiations by Mr. Fox, on Mr. Saft's behalf, the Government agreed to permit Mr. Saft to reduce his maximum exposure for the very serious crimes charged to nine years imprisonment and agreed to accept a plea of guilty to Counts 3, 6 and 22. Significantly your deponent recalls that during the plea bargaining discussions, Mr. Fox did state that there were certain counts to which he felt Mr. Saft could not allocute. However, as of the time that the plea discussions had been finalized in or about the last week of September 1976, Mr. Fox advised me that his client, Mr. Saft, would be able to allocute to all of the three charges to which he was pleading guilty.

SAS:BR:1
12-529

3. Furthermore -- contrary to Saft's supposed contentions (Saft Aff., p. 15) -- the key point in the allocution regarding the purpose for submitting the false financial statements is that they were submitted to obtain bank loans from the banks and, once again, Mr. Saft, to your deponent's recollection, displayed no hesitancy in recounting that the purpose of submitting the false financial statements was to obtain bank loans (Tr. 15, 16). In fact, Mr. Saft was so knowledgeable about these transactions that he recounted the circumstances of the amounts of each of the two bank loans in some detail (Tr. 17-18).

Furthermore, Saft's affidavit obviously recognizes that he was well aware of the existence of the bank loans and that financial statements were being submitted in connection with obtaining the loans (e.g., Saft Aff. p. 5). As a result Saft's claims in this respect are sheer nonsense!

4. In connection with the allocution to Counts 3 and 6, the Court asked Saft the following questions and Saft replied promptly as follows:

The Court: You knew it was against the law to do what you were doing in each instance, did you not?

The Defendant: Yes, Your Honor.

The Court: And you intended to do it at the time you did each instance, is that not so?

The Defendant: Yes." (Tr. 17)

5. Equally absurd is Saft's contention that his allocution on the tax evasion count (Count 22) was somehow wanting. Saft's contention here is that his allocution was insufficient to demonstrate that, at the time, Saft knew that his returns were false in a substantial amount.

Contrary to his claims, Saft admitted that it was his primary purpose to evade or defeat the tax fully due (Tr. 20-21). He further acknowledged that he intended to do what he did and knew it was a violation of the law to do what he did (Tr. 21-22). And, finally, on two separate occasions he admitted that he knew at the time that his taxable income for 1973 was more than twice what he reported and that he owed ten to twenty thousand in taxes more than he reported. (Tr. 19-22).

26. In sum, while we recognize that it is the Court's recollection that will control, your deponent's recollection - and the transcript - are totally at odds with Saft's version of the events occurring at his allocution.

SAS:bmj
12-539

- IV. Saft's allegations, on their face,
do not constitute sufficient grounds
to withdraw his plea

27. The essence of Saft's contentions as to his motivations which led him to plead guilty, as set forth in his affidavit, boils down to certain statements made to him, and documents which were presented to his counsel and reviewed with him, regarding the strength of the Government's case.

When Saft's affidavit is stripped of its hyperbolic characterizations, and viewed in light of Mr. Fox's affidavit, sworn to November 22, submitted by Saft, it is apparent that Mr. Fox merely gave Saft the truthful advice that (i) the Government had a strong case against him, (ii) properly advised him that he should not plead guilty unless he believed himself to be guilty (Fox aff., p. 3), and (iii) that Saft rationally determined to plead guilty. By entering this plea, which was vigorously negotiated by Mr. Fox and Government counsel, Saft reduced his jail exposure from eighty years to nine years. Under the standards established by the cases, Saft has not demonstrated that his plea was involuntary, and his motion should therefore be denied on its face.

28. Saft alleges in his affidavit that Fox advised as follows:

If I went to trial, I took the risk of conviction on many if not all of the counts and, therefore, I would receive a longer sentence than the sentence I would receive after a plea on three counts. (Saft Aff. p. 10).

29. As the Government did state at the allocation in the event that the case went to trial that we would be able to prove the case against Saft on all of the charges beyond a reasonable doubt. (Tr. 100). It is not uncommon

that defendants who are convicted of crimes with a maximum penalty of eighty years altogether, receive a more severe sentence than those who freely admit their wrongdoing and plead guilty to crimes aggregating nine years in total penalties. And this is particularly so in a case where the defendant is convicted after having taken the stand and testified falsely. So if Mr. Saft should have received such advice it would not have been erroneous. In any event, Saft without hesitation did allocute to the following question as follows:

"THE COURT: Mr. Saft, have you been induced to offer to plead guilty by reason of any promise, statements, or predictions by anybody in the event you will get leniency or consideration by pleading guilty instead of going to trial.

THE DEFENDANT: No." (Tr. 11).

30. Saft also states that he was advised:

One of my co-defendants had just pleaded guilty and if I did not plead, that defendant would cooperate with the Government and would not be sentenced until after he testified, for the government, at my trial.

Shortly before Saft entered his guilty plea, co-defendant Edward Weizer entered his guilty plea and began cooperating with the Government. Mr. Weizer's sentencing date, in view of the time of his plea, September 1976, was to have occurred after the trial. So it is difficult to perceive Saft's argument on this score.

31. Saft also states that he was informed by Mr. Fox:

"In addition to the charges in the indictment, the government had evidence that I had destroyed records in an attempt to obstruct the investigation."

Contrary to the allegations in the Saft Affidavit (p. 12), the Government does indeed have evidence and testimony that Saft destroyed or caused the disappearance and revising of various records which would have revealed facts concerning his looting of Adlay, siphoning off of Adlay's funds or were otherwise pertinent to his knowledge of the true state of affairs at Adlay Jewelry.

32. Mr. Saft also states:

"Finally, he also told me either that he had seen evidence or had been given evidence or some letter or memorandum on which I confirmed prior knowledge of an alleged misstatement in one of the financial statements submitted to the banks."

In view of Saft's refusal to identify more specifically what document or documents he discussed with Mr. Fox, we point out that, in view of Mr. Fox's representations to the Government that he was proceeding in good faith with the plea discussions, in an effort to move the plea negotiations along more rapidly, the Government went beyond the formal requirements of the discovery procedures and voluntarily specified and furnished certain documents that would be especially incriminating from Saft's viewpoint. Among those are a memorandum which, according to our evidence, Saft received in late December 1973 showing his awareness that at that time the Notes Payable of Adlay and its

subsidiaries amounted to \$2.6 million,* whereas Adlay's financial statements falsely showed aggregate notes payable as of December 31, 1973 of only \$1.3 million. The Government has similar testimony with respect to the accounts payable situation and also with respect to similar events as of the end of 1972. In addition, the Government has - and did share with Mr. Fox - memoranda and related testimony making clear Saft's knowledge that he had borrowings from Adlay Jewelry far in excess of the paltry \$19,000 shown on the financial statements, as well as other documents showing Saft's siphoning of funds from Adlay.

33. On this last point, Mr. Fox's affidavit, attached to Saft's papers, states:

"During the course of representing Mr. Saft, I obtained discovery from the government of numerous documents and interviewed a number of potential witnesses. In September, 1976, additional disclosure by the government together with my own investigation, revealed certain new information which conflicted with Mr. Saft's assertions. I reviewed these materials with Mr. Saft at length, and advised him that in my professional judgment there were substantial risks that the government would prevail upon a trial with respect to a substantial number of the charges against him." (Emphasis supplied)

In view of the fact that since Mr. Cometa entered the case the Government has not supplied any additional discovery to Mr. Saft, we are at an utter loss to understand how Mr. Saft can now claim that he has a different under-

* A copy of this memorandum is annexed as Exhibit 6.

standing of what the Government's evidence is than he did while Mr. Fox was representing him (Saft Aff. p. 12). In this connection, Mr. Fox's November 22 affidavit states that he "reviewed these materials with Mr. Saft at length." In short, Saft was in every bit as good a position when he was represented by Mr. Fox as he is today to assess the strength of the Government's case.

34. Surely the statements regarding the Court's conducting the voir dire,* the length of the trial, and possible publicity are all facts of which Fox may have presented to Mr. Saft. And Mr. Saft's affidavit makes clear that Mr. Fox told him that the decision was Mr. Saft's to make (Saft Aff. p. 11). Neither does Mr. Saft dispute Mr. Fox's statement to him that he should not plead guilty unless he believed he was guilty. In sum, as more fully set forth in our memoranda, it is clear that taking Saft's papers in their entirety, including Fox's affidavit, the Court should deny Saft's Rule 32(d) motion to withdraw his plea.

* In view of Mr. Fox's statements to the Government that his conduct was entirely proper and his statements in his affidavit attached to Saft's papers regarding his due regard for the ABA cannons, it seems highly doubtful that Mr. Fox ever told Mr. Saft that he could not get an impartial jury in Federal Court.

V. Prejudice to The Government

35. Saft's papers cavalierly and conclusorily state that the Government will suffer no prejudice by his pre-sentence withdrawal of the plea. (Saft Aff. pp. 1, 20, Cometa Aff, p.2, Saft Memorandum, pp. 67). However, contrary to these conclusory contentions, the Government is significantly prejudiced in various respects from the situation that it would have been in had the case against Saft proceeded to trial on or about October 5, 1976, as originally scheduled (Saft Tr. 25). The facts are that Saft pleaded guilty on the virtual eve of trial on September 28, 1976, and attempted to revoke that guilty plea on the virtual eve of sentence.

36. In the first place, in connection with the preparations for the original trial, the Government utilized the time and energies of two Assistant United States Attorney (as well as two student assistants), and a Federal Bureau of Investigation Special Agent and an Internal Revenue Service Special Agent for about three weeks. (See sentencing memorandum, p. 10. (a copy of which is annexed hereto as Exhibit 1)). Virtually all of this time and effort will have to be reexpended and repeated at additional cost to the Government in the event that the Court decides to grant Saft's Rule 32(d) motion and orders a new trial.

Moreover, in preparation for the initial trial that was to have occurred on October 5, 1976, the Government interviewed more than twenty witnesses in person, as well as several additional witnesses on the telephone. Some of the witnesses were seen on more than one occasion. The

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witnesses* were inconvenienced in having unnecessarily to come to the United States Attorney's Office and they will be that much more reluctant to return in connection with another proposed trial date. Moreover, we merely call the Court's attention to the fact that witnesses move and are sometimes, for that reason, difficult to locate as another obvious example of prejudice (not to mention that the United States Treasury will have to pay out statutory witness fees and mileage to these same witnesses who will have to be re-interviewed if Saft's Rule 32(d) motion is granted).

37. Thirdly, based on the representations of David L. Fox, Esq., that the plea negotiations were being conducted in good faith, the Government furnished more additional discovery, particularly, in the form of proposed witness testimony than it would ordinarily have turned over to counsel. In addition, in a detailed sentencing memorandum and in lengthy conversations with the Probation Office, the Government has set forth its position and theory of the case with great specificity. Saft has enjoyed access to both the sentencing memorandum and the probation report. This information is clearly not discoverable prior to trial. Indeed, when counsel for the three defendants sought this information, the Government vigorously opposed these requests, and their claims were either denied by the Court or not pressed.

* With respect to the witness, Edward Weizer, we merely mention that Saft's motion has resulted in Weizer's being sentenced prior to Saft's possible trial rather than after the October 5, 1976 trial date originally set and cite this as another possible fact.

38. Actually, in view of Saft's having notified the Government of his intent to make this motion on November 3, 1976 - the virtual eve of his sentencing date - the Government's position has changed every bit as much as if the instant motion had been made right after Saft had been sentenced.

39. Saft cites as the rationale for the distinction between pre-sentence and post-sentence withdrawal, where defendant must show "manifest injustice", the fact that to allow withdrawal in the latter case would permit a frittering away of the time and painstaking effort devoted to the sentencing process. (Saft Memorandum, p. 5). Surely, after the Government has submitted its sentencing memorandum and after the Probation Office has submitted its report and recommendation, where both the Government's and Probation Officer's position have been made available to Saft, to allow withdrawal here would permit a frittering way of the detailed efforts devoted to the sentencing process. In sum, the Government in a variety of important and material respects has relied on the plea and would suffer detriment if the Rule 32(d) motion were granted. For this reason, as well as others, Saft's Rule 32(d) motion should be denied on its face.

VI. Other Distortions and Falsehoods in
Saft's Affidavit

40. Up to this point, the Government has taken issue with those facts which it disputes that go to the essence of Saft's motion. However, there is a plethora of other statements in Saft's affidavit which are false, distorted, inaccurate or otherwise present a misleading picture. The Government in the interest of brevity will not detail each and every misstatement with which we quarrel.

41. As to Saft's statement at page 3 that "all the Court knows of me is what it has read in the indictment, what has been said about me by the prosecutor during the arraignment and the allocution, and what has been written by the prosecution in his pre-sentence memorandum," Saft omits to mention that he appeared before the Court on September 28, 1976 and allocuted to the charges set forth in Counts 3, 6 and 22. He also ignores the fact that he had an opportunity make a statement to the Probation Office which also prepared a report for the Court.

42. At page 4, Saft gives the impression that his accountant, Leon Chaikin -- and not Saft -- conducted the transactions with the banks in 1973 and 1974, and prior thereto throughout Adlay's existence. That statement is clearly false since Saft himself was present and participated on Adlay's behalf at various meetings with various banks (and other financial institutions) during the times when the bank loans were negotiated and the various financial statements for Adlay Jewelry discussed, as various witnesses can attest.

43. Moreover, contrary to the overall impression that Saft endeavors to give in his affidavit, based on our investigation, Saft, as Adlay's President and Chief Executive Officer, was highly knowledgeable as to Adlay's financial situation. He knew on a very regular basis what the liability situation, including accounts payable and notes payable, was; and he was very familiar with the financial affairs of his company and various details. Nor does the Government have any doubt but that we can demonstrate that Saft was aware that Chaikin and Fialkow did not supervise the taking of physical inventory in each of the

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years 1971, 1972 and 1973, and that he was well aware that he was "borrowing" and otherwise taking huge amounts of money from Adlay over and above his salary which were not reflected on Adlay's financial statements. Furthermore, the Government has evidence that Mr. Saft gave Chaikin & Fialkow an undisclosed 5% contingent stock interest in Adlay Jewelry in April 1973 which destroyed that accounting firm's requisite independence and rendered them unable to render an opinion on Adlay Jewelry's financial condition.

44. Saft's description (at page 5) of Adlay's history with the Internal Revenue Service is distorted to say the least. I have been advised by an IRS Special Agent, based upon IRS records, that Adlay Jewelry, Inc. in 1972 was audited to ascertain if additional revenue was owing to Government and, that year, it was determined that a deficiency in a small amount of additional tax was owing to the Government. Moreover, the Special Agent has further informed me, based on IRS records that, for the 12 quarters, beginning in March 1971 and continuing up to December 1973, the IRS has assessed penalties in excess of \$5,000 against Adlay Jewelry by reason of its failure to timely deposit amounts in respect of employment taxes.

45. In addition, contrary to the impression set forth in Saft's statements at page 5 of his affidavit, the Government's investigation reveals that Adlay Jewelry in 1972 and 1973 was often hardpressed for money and that Mr. Saft frequently took various steps in those years to put off creditors who were pressing him.

46. Moreover, what is striking about Saft's papers is the extent to which they blithely ignore the extensive wrongdoing in which he personally was partaking in the looting of Adlay.

47. Saft states (at page 6) that the S. Klein Department Store Chain closed in 1974. Saft's statement is false; your deponent has been advised that the first Klein's store to close did not close until February 1975 (more than six months after the Adlay bankruptcy) and that the last Klein's store to close (in Union Square on 14th Street) did not close until August 1975 over a year after Adlay's bankruptcy.*

48. Regarding the false inuendoes about the motives of the investigating agencies (Saft Aff, p. 7), the investigation was commenced by the United States Attorney's Office as a result of a complaint by one of the defrauded banks. Far from Saft's assertion about the breadth of the investigation being the case, the Government, although it had information that Saft was acquainted with a variety of nationally prominent individuals, interviewed merely two such persons in connection with this investigation; neither did the Government interview the great majority of Adlay Jewelry's employees, customers or firms to which it sold jewelry. Moreover, so far as your deponent is presently aware, the only political activities that led to Mr. Saft's being investigated were his campaign contributions and other transactions with political figures which led to the investigation of him by the Watergate Special Prosecutors Office.

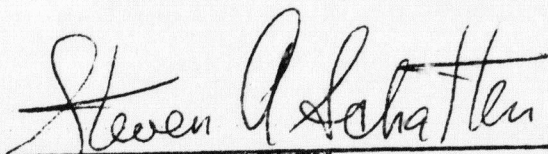
* Speaking of bankruptcy and willingness to pay creditors, it might have been helpful if Saft informed the Court that he advised the Probation Officer that his assets are \$75.00 and liabilities \$4,000,000, which suggests that his willingness to pay creditors is little more than a self-serving pious hope.

49. On Friday, December 3, 1976, your deponent telephoned Doris Chaikin who advised me that, although she was under the impression that Leon Chaikin had died with fear, Mr. Chaikin had never made any statements admitting his guilt to her. Mrs. Chaikin further stated that Leon Chaikin did not tell her that he (Chaikin), rather than Saft, was responsible for the events resulting in this investigation. Mrs. Chaikin in fact said that her husband discussed neither his own participation nor that of Saft. Finally, Mrs. Chaikin gave me the impression that her letter to and conversation with Mr. Saft proceeded out of human kindness, and the lengthy discussion to which Saft alludes at the bottom of page 18 has not taken place.

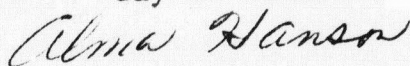
50. As for the affidavit of Jack M. Portney of the accounting firm of Jack M. Portney, C.P.A. of Fort Lee, New Jersey, who apparently met Mr. Saft for the first time in November 1976, Bernard L. Augen of the nation-wide certified public accounting firm of Clarence Rainess & Co., analyzed Adlay's financial statements and performed other accounting work in connection with Adlay beginning in or about June 1974, advised me that there were a number of statements in Mr. Portney's affidavit with which he disagreed. For example Mr. Augen was of the opinion that Mr. Saft would have known (i) how much money he had "borrowed" or otherwise taken out of Adlay Jewley, Inc., (ii) that Chaikin & Fialkow did not supervise the taking of physical inventory at Adlay and (iii) the liabilities situation at Adlay, the approximate amount of accounts payable and notes payable, in each instances as of the time the financial statements were prepared.

CONCLUSION

51. The Government, for the reasons more fully set forth herein and in our memorandum of law, respectfully submits that Saft's Rule 32(d) motion to withdraw his guilty plea should be rejected on its face, without the necessity of holding a hearing. However, if the Court is not disposed to deny Saft's motion on its face, the Government respectfully insists that this Court hold a hearing, at which all of Mr. Fox's memoranda of interviews and documents currently in his possession and/or in Mr. Cometa's possession, may be subpoenaed, and at which Mr. Fox and Mr. Saft will be called upon to testify. In the light of the flagrant assertions and allegations of supposed misconduct by Mr. Fox which are detailed in Saft's affidavit, the Government submits that a hearing should be held unless the Court decides to reject Saft's motion on its face.


STEVEN A. SCHATTEN
Assistant United States Attorney

Sworn to before me this
8th day of December 1976



ALMA HANSON
NOTARY PUBLIC, State of New York
No. 31-15050 Qualified in Kings Co.
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

HOWARD E. SAFT,
NORMAN FIALKOW and
EDWARD WEIZER,

Defendants.

76 Cr. 414 (LWP)

SENTENCING MEMORANDUM

A. Introduction

This memorandum is respectfully submitted to provide the Court with certain information which the Court may consider relevant in determining the appropriate sentences in this case.

The gist of the crimes charged in Indictment 76 Cr. 414 (LWP), involves the submission by defendant Howard E. Saft, as President of Adlay Jewelry, Inc. ("Adlay"), and by co-conspirator Leon M. Chaikin (now deceased), defendant Norman Fialkow and their accounting firm, co-conspirator Chaikin & Fialkow ("C&F"), of materially false and misleading financial statements which were presented to four banks, as well as other financial institutions, in connection with loan applications amounting to approximately five million dollars. When Adlay went into bankruptcy in June 1974, the banks and other creditors lost

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over 80% of their investments.

Adlay's business consisted principally of purchasing jewelry and of operating jewelry concessions in such department store chains as S. Klein Department Stores, Inc., Robert Hall Village and Clarkins; the retail outlets were located in the metropolitan New York area and in other parts of the United States. Adlay's product line consisted of precious jewelry, watches and costume jewelry.

All three defendants were charged in Indictment 76 Cr. 414 (LWP) with conspiring to and participating in a scheme to prepare and distribute false financial statements for Adlay and its subsidiaries for the calendar years 1971, 1972 and 1973. In addition, Saft was charged with income tax evasion for understating his taxable income in 1973 by over \$100,000. Fialkow was also charged with having testified falsely before a Grand Jury in violation of Title 18, United States Code, Section 1623.

B. The Guilty Pleas

On September 20, 1976, defendant Edward Weizer entered a guilty plea to a superseding information charging that, from January 1, 1973 to January 1, 1975, he wilfully, and with the knowledge that offenses against the United States had been committed, namely, violations of

d-366 Title 18, United States Code, Section 1014, in connection with the unlawful submission of false financial statements of Adlay Jewelry, Inc. and its subsidiaries to various banks, did receive, comfort and assist co-conspirator Leon Chaikin and defendants Howard E. Saft and Norman Fialkow in order to prevent their apprehension, trial and punishment for said offenses, in violation of Title 18, United States Code, Section 3.

On September 28, 1976, with an impending October 5, 1976 trial date, defendant Howard Saft entered his plea of guilty to Counts 3, 6 and 22 of Indictment 76 Cr. 414 (LWP). Counts 3 and 6 charge defendant Saft with the submission of false financial statements for Adlay and its subsidiaries to the Empire National Bank and the National Bank of North America in connection with bank loans amounting to more than two million dollars. Count 22 charges defendant Saft with income tax evasion wherein he evaded taxes on over \$100,000 of unreported taxable income in 1973.

On September 30, 1976, defendant Norman Fialkow entered his plea of guilty to Counts 2 and 4 of Indictment 76 Cr. 414 (LWP).* Counts 2 and 4 charge defendant Fialkow with the submission of false financial statements for Adlay and its subsidiaries to the Bank Leumi Trust Company of New York and the Empire National Bank in connection with bank loans amounting to more than one million dollars.

* In connection with his guilty plea, defendant Fialkow entered into an agreement, dated September 29, 1976, wherein, inter alia, Fialkow agreed to give up his license as a public accountant, not to reapply for admission, and not represent clients before Federal and State agencies.

C. Summary of the Government's Proof.

Had the instant case gone to trial, the proof would have established a massive, crass and utterly brazen scheme to submit false financial statements to various banks and others. The scheme was devised and dominated by defendant Howard E. Saft, who reaped the lion's share of the ill-begotten gains, and by co-conspirator Leon Chaikin, (now deceased). They were materially and knowingly assisted in their fraudulent activities by defendant Norman Fialkow, a partner in C & F who worked on the Adlay account, (C & F's largest client); and, to a much lesser extent, by defendant Edward Weizer.

The proof would have established that the objects of the scheme and conspiracy were (i) to prepare and submit false and misleading financial statements for Adlay and subsidiaries, (ii) to conceal the true state of affairs at Adlay, including the amounts actually owed creditors, and the fact that Saft was secretly taking out of Adlay and its subsidiaries hundreds of thousands of dollars for his own use and for his purposes, and (iii) to thereby cause the unsuspecting banks, other lending institutions and creditors to loan or otherwise advance over five million dollars to Adlay and its subsidiaries.

Pursuant to the scheme and conspiracy -- and contrary to what was set forth in the 1971, 1972 and 1973 financial statements prepared by C&F and contrary to generally accepted accounting principles -- C&F at no time

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physically supervised or checked the inventory for accuracy. Moreover, contrary to the representations in the financial statements to the effect that the inventories as shown on the financial statements "represent their true valuation at cost" as of the year end, the inventory was valued in an entirely arbitrary and misleading manner which falsely and improperly inflated its value.*

In addition, the 1973 financial statements which were submitted to Bank Leumi, Empire Bank and National Bank of North America concealed the fact that Saft had loans due to Adlay and its subsidiaries in the amount of \$248,000 as of December 31, 1973; instead the Adlay financial statements falsely showed that Saft had borrowed only \$19,000 as of the end of 1973. Moreover, to the knowledge of each

* The method employed by C&F -- which was well known to Chaikin and Fialkow as well as the other accountants -- was to take an arbitrary and fixed percentage of Adlay's retail price, i.e., 40% for costume jewelry, 60% for precious jewelry and 70% for watches, and to consider such percentages to reflect Adlay's out-of-pocket cost for the jewelry, regardless of the actual amounts expended. Clarence Rainess & Co., certified public accountants, who conducted a financial investigation into the Adlay situation in or about May and June 1974, concluded that the C&F method improperly inflated inventory as of the end of 1973 by approximately \$1.2 million.

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of the defendants, the 1973 financial statements concealed the fact that defendant Saft had caused an Adlay subsidiary to expend approximately \$200,000 on the remodelling of Saft's custom-built residence in East Hampton.* These latter expenditures, which in no way constituted an asset of Adlay or of its subsidiaries and in no way benefited Adlay or its subsidiaries, were falsely listed on Adlay's financial statements as "Leasehold Improvements, Furniture & Equipment." Indeed, defendant Fialkow received and made notations on two schedules that had been submitted to him by a junior accountant in the C&F firm to the effect that Saft between 1971 and 1973 had looted Adlay to the tune of more than one-half million dollars, including the moneys expended on his East Hampton residence that had been wrongfully charged to "furniture & fixtures".

The Government's proof would have demonstrated, both by documentary evidence in part in Fialkow's handwriting and by live witness testimony, that Fialkow was well aware of the magnitude of Saft's looting of Adlay and the falsity of the financial statements. Indeed, the Government had proof to the effect that Fialkow knew that the moneys that Saft was taking were having a most deleterious effect on Adlay's corporate well-being.

* The Saft House, as it was called, is discussed and displayed in Scully's book, "The Shingle Style Today", pp. 33-34, fig. 112 (1974).

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Furthermore, in or about April 1973, Saft gave Chaikin a letter to the effect that, when Adlay would go public within the short term future, he would give Chaikin a minimum of 5% of Adlay's stock. In April 1973, Chaikin transferred to Fialkow half of his interest in the 5% stock interest in accordance with the terms of the C & F partnership.

Subsequently, in or about May 1973, defendant Fialkow arranged for the reissuance of, and signed, the 1971 certified financial statements of Adlay which were false in a variety of respects, as Fialkow well knew. Moreover, as of that time -- by reason of the 5% contingent stock interest that Chaikin and Fialkow enjoyed in Adlay -- C & F was no longer in a position to render an opinion with respect to Adlay's financial statements because they lacked the requisite independence. That is, in accordance with generally accepted accounting principles, the financial statements had to contain a caveat to the effect that C & F could not render an opinion with respect to Adlay. Nonetheless, Fialkow signed the 1971 financials which were reissued in May 1973, without any such caveat. Moreover, the December 31, 1973 Adlay financial statements went out lacking any such qualifying language attesting to the inability of C & F to render an opinion. American Institute of Certified Public Accountants ("AICPA"), Code

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of Professional Ethics, Rule 101(A)(1); AICPA Professional Standards, pp. 731-732, Rule 03.

We further call the Court's attention to the fact that the 1973 financial statements, prepared by C & F, understated the liabilities of Adlay by three million dollars and that the 1972 financial statements understated the liabilities of Adlay by over two million dollars. Saft was the most flagrant and wilfull wrongdoer who profited by far the most as a result of the scheme. He took out of Adlay - over and above his \$50,000 salary - in excess of \$500,000 between 1971 and 1973, which amounts were fraudulently concealed on the financial statements for Adlay. As Adlay's bankruptcy approached in the spring of 1974, Saft arranged for the destruction of - and the revision of - various documents which had the effect of covering up and concealing the moneys that Saft was taking from Adlay. One such scheme involved Saft taking cash which represented proceeds obtained as a result of jewelry sales to Adlay employees at discount prices. The Government, in the course of the investigation, received evidence to the effect that in or about the spring of 1974, Saft caused the destruction and disappearance of various records which would have revealed important facts pertaining to the amounts of cash proceeds taken

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by Saft in this fashion, as well as \$200,000 taken from Adlay to remodel his East Hampton residence.

Fialkow's profit and motive was attributable to the fact that Adlay was C & F's largest client, accounting for approximately one-third of C & F's gross income during the years 1970-1973. In addition, Fialkow held rights in the 5% contingent stock interest given by Saft. These facts furnished ample motive for Fialkow to participate and to further the scheme. However, as stated at the time of Fialkow's guilty plea, defendant Fialkow's culpability was of lesser degree than that of defendant Saft or co-conspirator Chaikin.

D. DEFENDANT EDWARD WEIZER

Defendant Edward Weizer, a junior accountant at C & F made certain false entries in Adlay's books which were designed to conceal the fact that Saft was taking moneys out of Adlay to remodel his home in East Hampton. Weizer did not assist the Government during the grand jury stage and, on one occasion, made false statements in the United States Attorney's office to minimize his own involvement. Nonetheless, approximately two weeks before trial, Weizer pleaded guilty to being an accessory after the fact and, at that point, cooperated fully with Government. The information that he furnished was very helpful to the Government in obtaining the guilty pleas of the other defendants.

E. IMPORTANCE OF THE CASE

It would be a gross understatement to say that the detection and prosecution of this case was difficult, time consuming and expensive.

Enormous government resources were expended in the investigation which took place over a period of about eighteen months. At various times the investigation occupied the time of an Assistant United States Attorney, a Federal Bureau of Investigation Special Agent and various agents of the Internal Revenue Service. The preparation of the case for trial - and the guilty pleas of Saft and Fialkow did not occur until the eve of trial - required extensive efforts of two Assistant United States Attorneys, an Federal Bureau of Investigation Special Agent and an Internal Revenue Service Special Agent for a period of about three weeks.

It is apparent that Saft and Fialkow were both aware of the difficult problems which law enforcement officials would have in detecting the unlawful scheme and engaging in a successful prosecution. This is evidenced (i) by Saft's complicated activities, including destruction and revision of various Adlay records, which were designed to conceal the true nature of his activities in the looting of Adlay; and (ii) by Fialkow's perjury in the grand jury, as well as other subterfuges designed

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to cover up and minimize Fialkow's criminal participation. We respectfully submit that the deterrence of these defendants and other like-minded persons from the commission of similar acts to the detriment of the unsuspecting public in the future is a factor of singular importance in this case. The easy rewards involved in carrying out a scheme of this nature are so vast that unless substantial deterrent penalties are imposed, offenders of this particular type will be encouraged to embark upon similar fraudulent schemes. We therefore respectfully submit that a key purpose of these prosecutions, as well as other "white collar" prosecutions, is to deter others from perpetrating such large scale frauds. Of equal importance, we believe, is the public's conception that justice is being done. It is vitally important that "white collar" swindlers be treated no more leniently than "common thieves".

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

STEVEN A. SCHATTEN
Assistant United States Attorney

- Of Counsel -

1
2 HOWARD E. SAFT, called as a witness,
3 having been duly sworn by the Forelady of the Grand
4 Jury, testified as follows:

5 MR. SCHATTEN: Good afternoon.

6 BY MR. SCHATTEN:

7 Q Would you kindly state your name for the
8 record, please?

9 A Howard E. S-a-f-t, Saft.

10 Q Now, Mr. Saft, you are appearing here pursuant
11 to a subpoena in connection with an ongoing investigation
12 involving allegations of violations of Title 18, United
13 States Code, Section 371, as well as other alleged viola-
14 tions, and in that connection, I want to advise you that
15 you have a Constitutional right to refuse to answer any of
16 my questions.

17 Do you understand that?

18 A Yes.

19 Q And I want to further advise you that you have
20 an absolute right to remain silent and to refuse to answer
21 any questions, and that anything you do say in this Grand
22 Jury can be used against you in a court of law.

23 Do you understand that?

24 A Yes, sir.

25 Q And I want to further advise you that you have

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11 E. SAFT

1 a Constitutional right to consult with an attorney and to
2 have that attorney waiting outside this Grand Jury room.
3

4 Do you understand that?

5 A Yes, sir.

6 Q And I understand that you have retained and Mr.
7 Sandor, S-a-n-d-o-r, Frankel, F-r-a-n-k-e-l, and that Mr.
8 Frankel, your attorney, is waiting outside this Grand Jury
9 room presently, is that correct?

10 A Yes, sir.

11 Q I want to further advise you that if you do not
12 have the funds to retain an attorney, an attorney could be
13 appointed for you and you would not have to answer any
14 questions until that attorney was appointed and you consult
15 with him.

16 Do you understand that?

17 A Yes.

18 Q What is your current address?

19 A 153 East 57th Street.

20 Q And what is the date of your birth?

21 A October 18th, 1922.

22 Q Do you have any other residential addresses as
23 of the present time?

24 A On advise of counsel, I respectfully decline to
25 answer that question based upon my rights under the Fifth

Amendment to the United States Constitution.

Q What is your present business address?

A On the advice of counsel, I respectfully decline to answer that question based upon my rights under the Fifth Amendment to the United States Constitution.

Q Now, the subpoena that was served upon you directed, did it not, that you produce any and all books and records of Adlay Jewelry and its subsidiaries in your possession, custody or control, including, without limitation, all account ledgers, all journals, all other financial records, all checks, all checkbooks and bank account records, all records with respect to loan applications, all payroll records, all stock books, all stock records, all corporate minute books, all correspondence files, all minutes of directors meetings, notes, all internal memoranda, all internal accounting records, all records prepared by Adlay Jewelry's certified public accountants, and all financial statements for Adlay Jewelry and its subsidiaries.

Have you produced all of those records pursuant to the subpoena served upon you?

MR. SCHATTEN: Let the record reflect that Mr. Saft is now showing us a book.

Can we mark this book as Grand Jury Exhibit Number 15 as of this date? (So marked.)

1
2 Q I want to show what has been marked as Grand
3 Jury Exhibit Number 15. Could you identify that? Can you
4 tell us what this book is?

5 A On advice of counsel, I respectfully decline
6 to answer that question based upon my rights under the
7 Fifth Amendment of the United States Constitution.

8 Q All right.

9 MR. SCHATTEN: Now, I would like to have a
10 series of one, two, three, four, five checks marked
11 as Grand Jury Exhibit Number 16.

12 Let the record note that these checks are
13 checks of Adlay Jewelry, Inc. The check numbers are
14 7371, 7489, 7045, 7289 and 7121, and I would like to
15 have them marked collectively as Grand Jury Exhibit
16 16.

17 Mr. Reporter, would you kindly attach a piece
18 of paper to the checks and mark them Grand Jury
19 Exhibit 16. (So marked.)

20 Q You have produced these five checks in response
21 to the subpoena, is that correct?

22 A May I --

23 Q You certainly may, yes. You are free to go out-
24 side and consult with your attorney at any time you so
25 desire.

A

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H.E. Saft

5-19-75

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(Witness leaves Grand Jury room, then returns.)

3

4

A The checks were given to you in response to the subpoena.

5

6

Q Could you also tell us what Grand Jury Exhibit Number 15 is?

7

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A On advice of counsel, I respectfully decline to answer that question based upon my rights under the Fifth Amendment to the United States Constitution.

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A Yes.

MR. SCHATTEN: Could you speak up, Mr. Saft, so that everybody can hear you?

A Yes.

MR. SCHATTEN: Please mark this publication as Grand Jury Exhibit 17. (So marked.)

Q And you've also produced a one-page leaflet entitled "Transportation Plans," where there's writing on both sides, and on the top there is the logo E.J.A., and

H.E. Saft

5-19-75

7

1
2 that's also in response to the subpoena, is that correct?

3 A Yes.

4 MR. SCHATTEN: Mark that Grand Jury Exhibit

5 Number 18 as of this date. (So marked.)

6 Q You've also produced a letter from William W.
7 Wilson, Regional Manager, to Mr. Howard E. Saft, Howard E.
8 Saft Associates, 200 Central Park South, New York, New York
9 10019, dated August 22nd, 1972, which I would like to be
10 marked as Grand Jury Exhibit Number 19, is that correct?

11 A Yes, sir.

12 (So marked.)

13 Q And you've also produced a letter dated August
14 29, 1972 to Mr. Howard E. Saft, care of Sylvia Nodelman,
15 N-o-d-e-l-m-a-n, Adlay Jewelry, Inc., 200 Park Avenue
16 South, New York, New York, from R.H. Rogers, Assistant
17 Treasurer, and we would like that to be marked as Grand
18 Jury Exhibit 20 as of this date.

19 (So marked.)

20 Q Do you have any books and records that are
21 referred in the subpoena in your possession, custody or
22 control to be produced?

23 A I just have to go out and ask.

24 (Witness leaves Grand Jury room, then returns.)

25 A No, I do not, sir.

2 Q I want to show you what has been marked as
3 Grand Jury Exhibit Number 12 as of May 16th, 1975. Can
4 you identify that document?

5 Leave all documents in here, please.

6 (Witness leaves Grand Jury room.)

7 MR. SCHATTEN: Let the record reflect that Mr.
8 Saft is going out to consult with his attorney.

9 (Witness returns.)

10 A On advice of counsel, I respectfully decline
11 to answer that question based upon my rights under the
12 Fifth Amendment of the United States Constitution.

13 Q I notice that the letter dated August 29, 1972,
14 is one addressed to you care of Sylvia Nodelman, Adlay
15 Jewelry, Inc., 200 Park Avenue South, New York, New York.
16 During the time of August 29th, 1972, were you connected
17 with a company called Adlay Jewelry, Inc.?

18 A On advice of counsel, I respectfully decline
19 to answer that question based upon my rights under the
20 Fifth Amendment of the United States Constitution.

21 Q And who is Sylvia Nodelman?

22 A I have to ask --

23 Q Sure.

24 (Witness leaves Grand Jury room, then returns.)

25 A On advice of counsel, I respectfully decline

1
2 to answer that question, based upon my rights under the
3 Fifth Amendment of the United States Constitution.

4 Q Mr. Saft, did you ever destroy any documents
5 of Adlay Jewelry Company, Incorporated, or any of its
6 consolidated subsidiaries in your possession, custody or
7 control?

8 A On advice of counsel --

9 Q I suggest that you go outside and confer with
10 your attorney.

11 A I just hate to belabor the Jury that much.

12 (Witness leaves Grand Jury room, then returns.)

13 A On advice of counsel, I respectfully decline to
14 answer that question based on my rights under the Fifth
15 Amendment to the United States Constitution.

16 Q Did you at any time ever ask anybody to destroy
17 any documents in the possession, custody or control of
18 Adlay Jewelry and its consolidated subsidiaries?

19 A On advice of counsel, I respectfully decline
20 to answer that question based upon my rights under the
21 Fifth Amendment to the United States Constitution.

22 Q Did you ever have occasion to ask anyone to
23 change any books and records of Adlay Jewelry Company,
24 Inc.?

25 A On advice of counsel, I respectfully decline

2 to answer that question based upon my rights under the
3 Fifth Amendment to the United States Constitution.

4 Q Now, during the period from 1970 up through and
5 including 1974, the certified public accounting firm working
6 with Adlay Jewelry was the accounting firm of Chaikin &
7 Fialkow, isn't that correct?

8 A I don't like to impose, but I --

9 Q You are free to step outside anytime you like.

10 (Witness leaves Grand Jury room, then returns.)

11 THE WITNESS: I'm sorry.

12 A On advice of counsel, I respectfully decline
13 to answer that question based upon my rights under the
14 Fifth Amendment to the United States Constitution.

15 Q All right. Now, I would like to ask you at
16 this time to write 25 times on five different sheets of
17 paper your name -- the name Howard E. Saft in script,
18 skipping two lines between each signature and writing not
19 more than five signatures to any one page. You are free
20 to consult with your attorney before responding to the
21 question, and you are free to consult with your attorney
22 before responding to any question, of course.

23 (Witness leaves Grand Jury room, then returns.)

24 THE WITNESS: Could you step out for a moment?

25 (Whereupon, Mr. Schatten and the witness left

1 the Grand Jury room.)

2
3 (The witness and Mr. Schatten returned to the
4 Grand Jury room.)

5 THE WITNESS: May I borrow your pen?

6 MR. SCHATTEN: Mr. Reporter, I would ask you
7 to mark the first page as Grand Jury Exhibit Number
8 21A. (So marked.)

9 MR. SCHATTEN: I'll ask the Grand Jury's Fore-
10 lady if she would be so kind as to initial -- to
11 sign and date the back.

12 You've given me 20. I'm sorry, I have to give
13 you another page.

14 Mr. Reporter, would you kindly mark the rest
15 of the series 21B, 21C, etc.

16 (Grand Jury Exhibit 21B through 21E were so
17 marked.)

18 Q Mr. Saft, I will also ask you to print the
19 name Adlay Jewelry Company, Inc. 25 times on this sheet
20 of paper, on these five sheets of paper, once again not
21 more than five to a page, if you would.

22 A The full name?

23 Q Adlay Jewelry Company, Inc., and print it, if
24 you will.

25 MR. SCHATTEN: Mr. Reporter, would you kindly

begin marking these 22 series, that is, 22A through E, and once again, I would ask the Grand Jury's Forelady if she would be so kind to date and sign each one of the documents that Mr. Saft is currently preparing. (So marked.)

THE WITNESS: On the second one, I didn't write out "company." I think I have to redo that.

THE FORELADY: Yes.

MR. SCHATTEN: Let the record reflect that at Mr. Saft's request, in connection with Adlay Jewelry Company, Inc., he will write an additional five times, Adlay Jewelry Company, Inc.

We will mark that as Grand Jury Exhibit F.

Q That is what you are currently doing, is that right, Mr. Saft? Your answer on the record, please? You are now currently writing five more times Adlay Jewelry Company, Inc.?

A Yes, I am.

(So marked.)

MR. SCHATTEN: The last sheet we will have marked 22F.

THE FORELADY: It is.

Q I would also like to ask you, five times to write out in script the address 200 Park Avenue South, New

1
2 York, New York 10003 on a sheet of paper I'm currently
3 handing to you. And I would also like you to -- after you
4 finish that, I would also like you to write the numerals
5 1 to 10 and also the numbers 1,000, 5,000, 10,000, 15,000
6 and 30,000, on this sheet of paper that I'm giving you.

7 So just to refresh your recollection on that,
8 first will be five times to write 200 Park Avenue South,
9 New York, New York 10003, five times. That will be script
10 writing in this case, script.

11 A I'm sorry.

12 MR. SCHATTEN: Mark that, Mr. Reporter, as
13 Grand Jury Exhibit 23A. (So marked.)

14 Q On the next sheet of paper, I would ask you to
15 write, on a separate line, 1 through 10, skip a line be-
16 tween each numeral, and after that, I would like you to
17 write the numbers 100, 1,000, 3,000, 10,000, 15,000, 30,000,
18 and 100,000.

19 I will ask you to do that two more times, if
20 you would, Mr. Saft.

21 MR. SCHATTEN: Let's mark these as 23B, C and

22 D. (So marked.)

23 Q I would like to show you the checks in the
24 16 series and I would like you to identify by the top
25 number which of these contain your signature?

1 A I have to get instructions again.

2 (Witness leaves Grand Jury room.)

3 MR. SCHATTEN: Let the record reflect that the
4 witness has left the Grand Jury room.

5 (Witness returns.)

6 A On advice of counsel, I respectfully decline
7 to answer that question based upon my rights under the
8 Fifth Amendment to the United States Constitution.

9 Q Referring to pages 130 and 131 of Grand Jury
10 Exhibit 15, these pages reflect a variety of checks issued
11 by Adlay Jewelry Company to the various parties receiving
12 payment in the amounts indicated that occurred in November
13 of 1972, is that correct?

14 A On advice of counsel, I respectfully decline
15 to answer the question based upon my rights under the
16 Fifth Amendment to the United States Constitution.

17 Q Do you know whose writing is in Grand Jury
18 Exhibit 15 on pages 130 and 131?

19 A On advice of counsel, I respectfully decline
20 to answer that question based upon my rights under the
21 Fifth Amendment to the United States Constitution.

22 Q If I were to ask you additional questions
23 about Grand Jury Exhibit 15, would your answers be the
24 same?
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A Yes, sir.

Q And if I were to ask you questions about your connection with a company called Adlay Jewelry Company, Incorporated, would your answer be the same?

A Yes, sir.

Q And if I were to ask you questions about the 1973 financial statement for Adlay Jewelry, Incorporated, prepared by the accounting firm of Chaikin & Fialkow, would your answer be the same?

A On advice of counsel, I respectfully decline to answer the question based upon my rights under the Fifth Amendment to the United States Constitution.

MR. SCHATTEN: Madam Forelady, would you kindly excuse the witness and ask him to wait outside.

THE FORELADY: You may be excused. Wait outside, please.

(Witness excused.)

(Time noted: 2:55o'clock p.m.)

UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA
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JOHN DOE
:
- - - - -X

United States Courthouse
Foley Square
New York, New York

May 16, 1975
10:30 A.M.

APPEARANCES:

STEVEN A. SCHATTEN, ESQ.

Assistant United States Attorney

Roy A. Selenske
Acting Grand Jury Reporter

RALPH FINK & ASSOCIATES

Certified Stenotype Reporters

140 NASSAU STREET

NEW YORK, N. Y. 10038

RFctor 2-5566

1 jqds

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 UNITED STATES OF AMERICA, :

6 -vs- :

7 HOWARD E. SAFT, NORMAN FIALKOW : 76 Cr. 414
8 and EDWARD WEIZER, :

9 Defendants :

10 -----x

11 B e f o r e :

12 HONORABLE LLOYD F. MacMAHON,
13 District Judge14 New York, New York
15 April 29, 1976--10:30 a.m.16
17 A P P E A R A N C E S :18 ROBERT B. FISKE, JR., ESQ.,
19 United States Attorney for the
20 Southern District of New York
BY: STEVEN A. SCHATTEN, ESQ.,
Assistant United States Attorney21 SANDOR FRANKEL, ESQ.,
22 Attorney for Defendant Saft23 JOHN DOYLE, ESQ.,
Attorney for Defendant Fialkow24 JERRY I. LEFKOWITZ, ESQ.,
25 Attorney for Defendant Weizer

EXHIBIT 3

1 jqds

B1

2 MR. SCHATTEN: This is a 23-count indictment
3 charging the defendant with submitting to four banks false
4 statements for three years in connection with \$5 million
5 in loans and it charges the defendant Saft looted his
6 corporation to the tune of \$500,000. All defendants have
7 been provided with copies of the indictment. I understand
8 they all intend to plead not guilty at this time.

9 MR. LEFKOWITZ: My name is Jerry I. Lefkowitz.
10 I represent the defendant Edward Weizer.

11 THE COURT: It's so good to have a lawyer appear
12 like a pro.

13 MR. LEFKOWITZ: At this point we waive the
14 reading of the indictment and enter a plea of not guilty.

15 MR. DOYLE: Your Honor, John Doyle, and I am
16 from Anderson, Russell, Kill & Olick, 630 Fifth Avenue,
17 and we represent Fialkow. He wishes to waive a reading of
18 the indictment and plead not guilty.

19 MR. FRANKEL: Your Honor, I am Sandor Frankel
20 from the office of Louis Bender, 225 Broadway, and we repre-
21 sent Mr. Saft. We enter a plea of not guilty and also waive
22 the reading of the indictment.

23 THE CLERK: Category 5. The case is assigned
24 to Judge Pierce.

25 THE COURT: Report to Judge Pierce.

1 jqds

2 MR. SCHATTEN: We have reached agreements with
3 the defendant Fialkow and he will consent to \$15,000 PRB
4 with bail limits in New York and New Jersey. We ask that his
5 passport be surrendered and that is agreeable.

6 As to defendant Weizer, his lawyer has consented
7 to a personal recognizance bond of \$10,000 with bail limits
8 in New York and New Jersey but with the right to travel any-
9 where along the eastern seaboard on a one-day business trip.

10 As to the defendant Saft, the government asks
11 for \$200,000 personal recognizance bond secured by cash or
12 surety. This is a \$500,000 fraud and Mr. Saft has Swiss
13 business connections, made trips to the Caribbean and as
14 recently as December 1975, he made business trips to England
15 and Greece. He is separated from his wife and we are not
16 aware of his current business or his current roots in the
17 community.

18 In view of the fact Mr. Saft is facing 80 years
19 in prison as well as substantial fines on the charges, we
20 think the bail is reasonable under the circumstances.

21 MR. DOYLE: With regard to Mr. Fialkow, we
22 agreed he would be entitled to travel in the continental
23 United States as long as there is written notice to the
24 government.

25 May the record reflect that I am furnishing

1 jgds

2 to Mr. Schatten the passport.

3 MR. LEFKOWITZ: Can I get the same agreement
4 with regard to Mr. Weizer?

5 MR. SCHATTEN: Written notice, address and tele-
6 phone numbers in each case.

7 THE COURT: Released on those terms as to those
8 two defendants.

9 MR. FRANKEL: With respect to Mr. Saft, I might
10 advise the Court and the government that Mr. Saft has traveled
11 outside the country subsequent to the time that Mr. Schatten
12 apprised the Court of this and with the Court's permission
13 would be leaving this evening for a business trip to Europe
14 and would return on Monday. I might advise the Court that
15 this investigation has been pending for about one year.
16 We have advised Mr. Schatten throughout the pendency of this
17 investigation that Mr. Saft would be available at all times
18 if and when needed, and he has been.

19 He was subpoenaed before the grand jury and
20 appeared pursuant to that subpoena. We, in fact, pleaded
21 with Mr. Schatten as early as June of 1975 that Mr. Schatten
22 simply apprise us, since we had been told that Mr. Saft
23 was a target, of when he must appear for arraignment because
24 he will certainly be here voluntarily, as he is.

25 He has at all times been available to us as his

1 jqds

2 counsel and we have advised the government that at all times
3 he will be available and has been available to the government.

4 Mr. Saft is 53 years of age. He is a graduate
5 of Columbia School of Business with a degree. He was born
6 in New York City and has spent substantially all of his life
7 in New York City. He is, in fact, separated now but he does
8 have a child. His business has always been conducted until
9 recently based in New York City, although the business itself
10 was a business that had branches all over the country.

11 Since the \$5 million that Mr. Schatten has re-
12 ferred the Court to refers to loans that were made to the
13 corporation, as far as we are aware Mr. Saft has virtually
14 no assets at all. He has been working recently as a salesman
15 on what I understand is virtually a door-to-door basis for
16 a company called Republic Office Supplies, selling office
17 supplies.

18 He has been attempting in the last half-year
19 or so to establish himself as a business consultant and
20 broker. It is in that connection that he has left the country
21 and has returned to the country, at all times voluntarily.

22 He has advised us at all times when he was leav-
23 ing and he told us when he is coming back and he always came
24 back. I advised the Court and Mr. Schatten that Mr. Saft
25 has plans, again with the Court's permission, to fly to Rome

1 jqds

2 this evening and to return on Monday. If I may respectfully
3 suggest to the Court what I think would be appropriate is
4 that Mr. Saft be permitted to travel freely in connection
5 with his business interests in the United States. If he is
6 to leave what has been described as the eastern seaboard
7 we would be glad to advise Mr. Schatten of where he is going,
8 when he will be back, and if he is going to leave the
9 country we will be glad to advise Mr. Schatten when he is
10 going and when he would come back.

11 The government's suggestion, I think, is com-
12 pletely out of line and I might advise your Honor that I
13 had asked Mr. Schatten to be able to discuss this with him
14 before we appeared in court before your Honor but it was
15 just this morning that Mr. Schatten advised me that he was
16 going to ask for this bail.

17 I think under the circumstances, your Honor,
18 it's absolutely unreasonable. Mr. Saft doesn't have money to
19 post as bond the funds that he will be using to travel to
20 Rome to consummate what has been a business transaction that
21 I understand goes back many, many months.

22 THE COURT: You are going round and round. You
23 have him in Rome four times.

24 MR. SCHATTEN: The government does not want
25 to be in any position where we have to worry about a defend-

1 jqds

2 ant going abroad. We would ask for the surrender of Mr. Saft's
3 passport. The charges in this case are charges of looting
4 the corporation to the tune of half a million dollars.
5 We find it very hard to believe the claim that Mr. Saft is
6 impoverished.

7 THE COURT: What bail do you seek?

8 MR. SCHATTEN: \$200,000 PRB secured by \$100,000
9 cash or surety.

B2 10 THE COURT: That is absurd.

11 The Court sets bail in the amount of \$50,000
12 secured by a \$5000 personal recognizance bond, cash rather,
13 \$5000 cash.

14 MR. SCHATTEN: And the surrender of the pass-
15 port?

16 THE COURT: Yes, and I deny your application to
17 travel abroad without prejudice to you or Judge Pierce, to
18 whom the case has been assigned.

19 MR. FRANKEL: May Mr. Saft travel freely within
20 the continental United States?

21 THE COURT: What do you say?

22 MR. SCHATTEN: Your Honor, the government would
23 ask for written notice, 48 hours in advance, telling the
24 government of every address at which he will be at together
25 with telephone numbers and the dates of those trips.

THE COURT: On those conditions, yes, 48 hours advance notice giving him a detailed and specific itinerary of where he will be at all times.

MR. SCHATTEN: Can we have the passport by the end of the afternoon?

THE COURT: Yes, by 4:00 o'clock.

MR. FRANKEL: May we have a week to post the \$5000 cash that your Honor has directed?

THE COURT: No, I don't think so.

MR. FRANKEL: May we have some time to post it, your Honor?

THE COURT: 4:00 o'clock this afternoon.

* * * *

.....X

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: SS.:

call from Steven A. Schatten, Assistant United States Attorney, requesting that I consent to be interviewed by the Government with respect to certain factual statements set forth in Mr. Saft's affidavit. Mr. Schatten also asked if I had previously seen or read Mr. Saft's affidavit and I informed him that I had not. Prior to that time I had not read or seen or received a copy of Mr. Saft's motion papers (except for my affidavit which is annexed thereto). Mr. Schatten offered to make a copy of Mr. Saft's motion papers available to me.

EXHIBIT 4

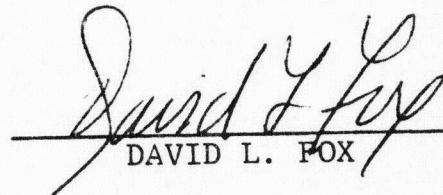
3. I was concerned that any such interview might violate my former client's rights. I informed Mr. Schatten that I wanted to obtain the consent of Angelo T. Cometa, Esq., Mr. Saft's new counsel, prior to being interviewed. I then telephoned Mr. Cometa in the late afternoon of November 24, 1976, informed him that I had not as yet seen Mr. Saft's motion papers and asked for his consent to be interviewed by the Government and to file an affidavit with respect to the matters raised in Mr. Saft's motion.

4. Mr. Cometa informed me that he refused to furnish his consent. In response to my request, Mr. Cometa arranged to hand-deliver to me a copy of Mr. Saft's motion papers. After I received Mr. Saft's motion papers, I again conferred with Mr. Cometa who again reiterated his position that I not confer with the Government.

5. On November 26, 1976, after having read Mr. Saft's motion papers, I telephoned Mr. Schatten and advised him that I had read Mr. Saft's motion papers.

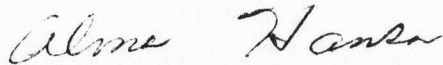
6. In response to Mr. Schatten's request, I informed him that but for Mr. Cometa's objection I was willing to confer with him and file a further affidavit to set the record straight, and that I believed Mr. Saft's affidavit to be incorrect in certain respects. However in view of the nature of the issues presented on the motion and Mr. Cometa's refusal to permit me to confer with the Government, I felt that I need a judicial

direction prior to conferring with the Government, filing
an affidavit, or testifying in connection with this matter.


DAVID L. FOX

Sworn to before me this

7th day of December, 1976.



ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24 6783450 Qualified In Kings Co.
Commission Expires March 30, 1977

SAS:slc

11-523

December 1, 1976

Hon. Lawrence W. Pierce
United States District Judge
United States Courthouse
Room 2601
Foley Square
New York, New York 10007

Re: United States v. Howard E. Saft
76 Cr. 414 (LMP)

Dear Judge Pierce:

We are in receipt of Mr. Cometa's letter to the Court, dated November 29, 1976, and are writing in response thereto.

Mr. Saft's Rule 32(d) motion papers detail at great length the alleged facts and circumstances surrounding his relationship with David L. Fox, Esq., his court-appointed counsel, from its inception (Saft Aff. p. 9), to the decision to enter into the guilty plea, including Saft's conversations with Mr. Fox prior to and at the time of Saft's guilty plea (Saft Aff. pp. 10-17), as well as circumstances occurring thereafter (Saft Aff. pp. 17-18).

Mr. Cometa's affidavit states that:

"The facts make it clear that, given Mr. Fox's persuasive influence upon the client, the defendant's ability to make a free will determination on the issue of guilt was totally destroyed."

It is the Government's position (to be set forth in our subsequent papers) that Saft's Rule 32(d) motion is

EXHIBIT 5

Hon. Lawrence W. Pierce

-2-

December 1, 1976

utterly lacking in merit and should be rejected in its entirety on its face. However, assuming arguendo that the Court deems it appropriate to inquire into the factual basis underlying Saft's statements, it is apparent that his allegations raise issues concerning the administration of justice before this Court and assigned counsel's responsibilities in connection therewith.

In an effort to ascertain the factual basis underlying Mr. Saft's allegations, I telephoned Mr. Fox on November 24, 1976 and asked him whether he had seen Mr. Saft's affidavit and whether he would be willing to confer with the Government with respect to the allegations made.

Mr. Fox informed me that, as of that time, he had not seen Saft's papers and that he would like to obtain the consent of Angelo T. Cometa, Esq., Saft's attorney, before conferring with the Government.

I subsequently conferred with Mr. Fox later on November 24, 1976 and was informed by him that Mr. Cometa had taken the position that Mr. Fox should not confer with the Government with respect to any of the matters or allegations raised by Saft's motion.

On November 26, 1976, the day after Thanksgiving, Mr. Fox telephoned me and advised that he had read Mr. Saft's papers. (Mr. Fox, after the Government had agreed to supply him with a copy of Saft's papers, had contacted Mr. Cometa and obtained a copy from him). Mr. Fox informed me that Mr. Cometa had reiterated his position that Mr. Fox not confer with the Government about the matters raised by Saft's motion because such conversations might be protected by the attorney-client privilege. Mr. Fox also said that he would like to confer with the United States Attorney's office and would like to file an additional affidavit with the Court in order to set the record straight. Mr. Fox further stated that, without going

CAS:gd
11-523

non. Lawrence W. Pierce

-3-

December 1, 1976

into specifics, Saft's affidavit was incorrect in material respects.

Since it is apparent that Mr. Cometa has undertaken to interview Mr. Fox and to present Mr. Fox's affidavit to the Court as part of Saft's motion papers (without previously showing him Saft's affidavit), the Government can perceive no reason whatsoever why it should be deprived of a corresponding right to interview Mr. Fox and present his affidavit responding to Saft's allegations. It is readily apparent, of course, that if Mr. Cometa's attempt to prevent Mr. Fox from conferring with the Government and filing an affidavit answering Saft's allegations should prevail, the Court might receive a misleading picture of the transactions and events culminating in Saft's guilty plea. Why Saft's present counsel should desire to leave the Court (and the Government) in this posture passes our understanding.

Fortunately, contrary to the position taken in Mr. Cometa's letter, it is well-settled that where the client asks the Court to resolve issues concerning his discussions with his counsel and the circumstances of his relationship with counsel, he waives his attorney-client privilege and thereby permits his attorney to set forth his version of the facts concerning the situation. Hunt v. Blackburn, 120 U.S. 464, 470-471 (1888); In re Associated Gas & Electric Co., 99 F. Supp. 743, 744 (S.D.N.Y. 1944); 8 Wigmore, Evidence §2327, at 638; McCormick, Evidence §93, at 194-195 (Cleary ed. 1972) ("If [the client] testifies to the privileged communications, in part, this is a waiver as to the remainder of the privileged consultation or consultations about the same subject").

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December 1, 1976

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In United States ex rel. Richardson v. McMann, 403 F.2d 48, 53-54 (2d Cir. 1969), vacated on other grounds sub nom. McMann v. Richardson, 397 U.S. 759 (1970), the Second Circuit in a situation similar to the present, held:

"Of course the exploration of these considerations virtually compels disclosure of what occurred between defendant and his counsel. Petitioner, having alleged what was told him and what was not, has waived his privilege against disclosure and his counsel is free to disclose whatever took place between him and his client.

. . . .

Serious charges five years after the event are made under oath against a member of the Bar appointed by the Court to represent appellant in defense of a first degree murder indictment, which can be summarized as inadequate representation to say the least. Full opportunity should be given to Mr. Rosner and his co-counsel to present their versions of the facts." See United States ex rel Mitchell v. Follette, 350 F.2d 922, 926 (2d Cir. 1965)

In United States v. Woodall, 438 F.2d 1317, 1322-26 (5th Cir.)(en banc), cert. denied, 403 U.S. 933 (1971), the Fifth Circuit strongly criticized the position espoused

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by Saft's present counsel:

"Courts earnestly pursuing reality would be hard put to justify a rule that would allow a defendant circumstanced as Woodall here to assert that his solemn pleas of guilty were negated for lack of accurate information of sentence consequences, then permit him to run a procedural trap play that would block the development of the plain truth which shows his own attorney told him exactly what he could expect. Not only does this specious sophistry fail to protect confidential relationships, it trifles with the truth -- it scoffs at justice -- and we reject it flatly."

438 F.2d at 1326 (footnote omitted).

Moreover, it is equally well-settled that willing witnesses are entitled to talk to counsel for either party in a lawsuit, and counsel in turn are entitled to attempt to interview any witness. Coppolino v. Helpern, 266 F. Supp. 930 (S.D.N.Y. 1967), approved "wholeheartedly" in IBM Corp. v. Edelstein, 526 F.2d 37, 41-44 (2d Cir. 1975).

* * * *

In order for the Government to prepare the most detailed response to Saft's Rule 32(d) motion papers, it is necessary to interview Mr. Fox and to submit his affidavit. To obviate the judicial intervention and supervision which would necessarily be entailed in the approach contemplated by the letter of Saft's counsel, prior to seeking any relief from the Court, we ask Mr. Cometa, in the interests

Hon. Lawrence W. Pierce

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December 1, 1976

of truth, justice and fair play, to abandon his unmeritorious position and release Mr. Fox from his manifestly improper instructions or directions not to talk to the Government.

Finally, we observe that, in view of Mr. Fox's statement to the Government that there are material matters in Saft's affidavit that are incorrect, this Court should not credit any part of Saft's affidavit unless and until it resolves the factual disputes between Mr. Fox and Mr. Saft; thus, unless the Court decides to deny Saft's motion papers on their face,* the Government is of the view that a hearing will be necessary at which both Mr. Saft and Mr. Fox will be called upon to testify as to the issues raised by Saft's motion papers.

ROBERT B. FISKE, JR.
United States Attorney

By:

STEVEN A. SCHATTEN
Assistant United States Attorney
Tel.: (212) 791-1938

cc: Angelo T. Cometa, Esq.
Phillips, Nizer, Benjamin,
Krim & Ballon
40 West 57th Street
New York, New York 10019

David L. Fox, Esq.
600 Madison Avenue
New York, New York 10022

* The Government reiterates its view that Saft's Rule 32 papers are utterly lacking in merit and that, for the reasons to be set forth subsequently in our answering papers to Saft's Rule 32 motion, this Court should deny Saft's motion in its entirety.

Dec 23

adley 1620,455
(256,709)
T 363,746

Chavez 1,077,897.

L.C. 256,709.

Total 2,698,352.

EXHIBIT 6

Dec 28, 1923

	Costume	Price	S.C.	Total
11	1301-		1301	1301
12	1301		1301	1301
51	105,451	41,392	9583	146,843
28	98,867	39,019	9583	137,884
Total	204,920	80,409	21,768	287,329
74	4 75,295	45,479	11,440	120,754
11	74,176	42,591	11,440	116,767
13	76,593	42,203	11,440	118,776
25	76,593	39,544	11,440	114,117
Total	306,597	169,817	45,760	492,414
100	4 71,525	42,362	9080	113,887
11	69,909	39,863	9080	109,772
17	63,558	39,368	9080	102,926
22	62,746	37,115	9080	107,361
Total	293,738	142,208	36,320	433,946
100	1 60,657	34,064	12,311	94,721
8	62,225	33,357	12,311	95,625
15	63,161	34,089	12,311	97,248
23	62,538	32,689	12,311	95,225
67	24,870	10,266	11,513	27,896
Total	295,444	155,261	60,957	410,715
100	6 54,054	28,943	11,513	82,977
12	53,782	29,053	11,513	80,800
20	52,152	26,469	11,513	78,579
29	48,214	24,311	11,513	74,905
Total	208,199	109,427	46,052	267,521

	Contract	Premium	LC	Total
June	41,616	22,526.	11513.	64,142.
1	42,390.	21,182.	11513	63,572.
11	41,616	19,701.	11513.	61,314.
21	39,565.	19,454.	11,513.	59,019.
July	165,184	92,863.	46,052	248,049.
uly	1 24,052	29,068.		53,120.
8	22,615.	29,448		52,063.
15	24,729.	23,234		53,011.
22	24,004.	29,016		51,020.
27	2494.	1162		4656
July	98,892	114,978.		213,870.
Aug	5 17,219.	22,330.		45,579.
12	17,589.	21,270		38,859.
19	17,589.	21,226.		38,823.
26	15,207	20,874		36,232.
July	67,951.	91,740.		159,691.
Aug	3 3255	19,456.		21,841.
9	3255	13,162.		21,457.
16	3255	18,162		21,457.
23	3256	13,162		21,458.
30				
July	12,121	72,992.		86,213.
Oct	9 1677	15,600		17,279.
16	1677	15,600		17,279
23	1677	15,600		17,279
30	1677	15,600		17,279
July	0000.	62,116		62,116

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

76 CR 414 (LWP)

-against-

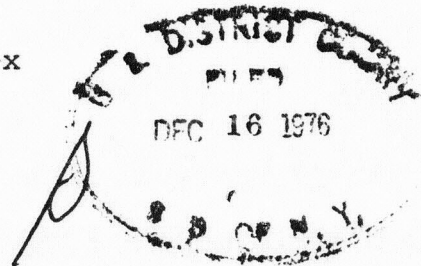
REPLY AFFIDAVIT OF
HOWARD E. SAFT

HOWARD E. SAFT, et al.,

Defendants.

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)



HOWARD E. SAFT, being duly sworn, deposes and says:

I submit this affidavit in reply to the government's papers, which I received December 9, 1976, and in further support of my motion to withdraw my plea entered on September 28, 1976. At the outset, I cannot help but observe that many of the inflammatory and wholly irrelevant allegations made by the prosecutor are calculated to prejudice my position in the eyes of the Court. I trust that the prosecutor's use of hearsay, innuendo and similar unsupportable vehicles for opposing my application will be disregarded by the Court in favor of the merits. No amount of obfuscation - including a jaundiced recitation of government allegations having nothing to do with the pending application - should prevent a fair disposition of my motion on the basis of a factual review.

A great deal of the prosecutor's papers deal with supposed discrepancies between my statement and the recollection of

my prior counsel. Whatever differences there may be in our respective recollections, I do not believe that Mr. Fox takes issue with the thrust of my statement: that he strenuously advised me to enter a plea and that his advice - both in substance and manner of presentation - had the effect of leading me to believe that I had no other choice.

In any event - despite suggestions to the contrary - I have not and do not invoke my attorney-client privilege with respect to the facts and circumstances surrounding the plea. As my attorney's letter of November 29, 1976 to the Court makes clear, my former counsel is certainly free to make a full statement of his recollections. It is the forum in which such statement is given that gives me pause. Both my attorney and I believe that it would be inappropriate for Mr. Fox to discuss with the government, evidentiary matters which may be crucial at a future trial. To insure that Mr. Fox is not interrogated about his evaluation of the probative worth of potential evidence, my counsel and I believe that a statement from Mr. Fox, if required, should be made in a judicially supervised forum.

Although I believe Mr. Fox has corroborated and would continue to corroborate the substance of my statement, there is at least one difference in our recollections. Mr. Fox states in his first affidavit - which was submitted to my attorney after I swore to my affidavit dated November 22, 1976, so that this is my first opportunity to respond to the statement of my prior counsel - that he advised me that I should not plead guilty unless I believed my-

self to be guilty. I recall no such counsel and do not believe that Mr. Fox ever gave me this advice. As Mr. Fox has admitted,

"In the six months that I represented Mr. Saft, he consistently stated to me that he believed himself innocent of criminal responsibility as to all the charges in the instant indictment."

In the light of his constant awareness that I believed myself to be innocent, the very idea that he would give me such advice simply does not make sense. In the face of my consistent statements of innocence, it would be a non sequitur for Mr. Fox to advise me to enter a plea only if I believed myself to be guilty. He did not give me such advice. What he did repeatedly counsel was that pleading guilty was "the best course to take," and then he would tell me why, in substance, I had no other choice.

I should add that, in addition to the numerous negative considerations recited to me by my court-assigned counsel which I have previously listed, I recall that on several occasions Mr. Fox also told me that I should not go to trial because the accountant on whom I relied for so many years, Chaikin, was deceased and that his death would make my defense difficult to prove. In retrospect, I cannot understand how Chaikin's death can possibly be considered to be a negative factor to my defense, since it is undisputed that Chaikin prepared all the financial statements in question, and it is the government who must prove beyond a reasonable doubt that Chaikin's criminal knowledge was shared by me.

I should also add that in strongly urging me to plead guilty, Mr. Fox told me not only that one co-defendant (Weizer)

had already made a bargain with the government, but that there was a strong possibility that the other co-defendant (Fialkow) would also plead guilty and would also cooperate with the government at my trial.

I have no doubt that my prior counsel constantly kept my best interests in mind in advising me. I cannot and do not fault Mr. Fox for making the professional judgments that he did. However, under the circumstances present here, I should not be deprived of making my own unfettered judgment on a matter as crucial to my future as the issue before this Court.

Finally, I would like to comment on the prosecutor's overall attitude and his total misconception of this motion.

The prosecutor states that the government's case is very strong and that at trial, the government would be able to prove beyond a reasonable doubt that I am guilty of all the charges set forth in the indictment. Then the prosecutor says that my motion to withdraw my plea, and the sworn affidavit I have submitted in support of that motion, are a "sham" and that before pleading, I made a "rational" decision to enter the plea.

His argument is untenable. Can the prosecutor suggest what my motive might be for making a "sham" motion? If, in fact, I believed I was guilty and I had decided that the government had a strong case, I would be very pleased with the guilty plea. After all, I am the one who risks conviction on all or several counts if I go to trial.

Is the prosecutor suggesting that I am making this motion for the sake of a few months delay in sentencing? Does he

think I would go through a long trial, with its attendant notoriety, humiliation and substantial expense for a brief delay? The prosecutor implies that I would engage in such a "sham" even though, he suggests, I know I am guilty and "rationally" expect to be convicted on all or several counts. The suggestion is ridiculous on its face.

The government's own position is without merit. If the prosecutor is so certain of my guilt and of his ability to prove my guilt, one would think he should be anxious to go to trial. It appears from the government's papers that the prosecutor believes I am such a diabolical person, that only a conviction on all counts should satisfy him.

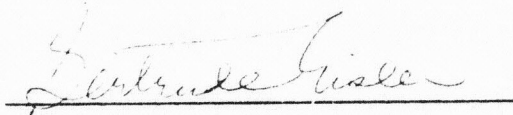
The plain truth of the matter is that I am not engaging in a "sham". I am innocent; I have always said I am innocent, and I am willing to take all the risks implicit in my proving that innocence at trial.

I should also add that my determination to go to trial is based upon my personal desire for total vindication. I retained new counsel on November 2, 1976 with the specific instruction that he prosecute a motion to withdraw my plea. My decision was based on (1) the fact that I could not live with myself for not responding truthfully to the court at the allocution; (2) the fact that my allocution was based upon a judgment that was merely a reaction to my prior counsel's urging - well intended and honest as it was; (3) Doris Chaikin's comment about her husband's dying with "fear and remorse" for what he had done; and (4) my determination to prove my innocence, which I have consistently proclaimed.

I no longer feel enveloped by those factors and premises which appeared inevitably to lead me to a plea. I want to fight to prove my innocence and I urge the Court to grant me that opportunity.


HOWARD E. SAFT

Sworn to before me this
14th day of December, 1976.



GERTRUDE EISLER
Notary Public, State of New York
No. 41-6156550 Queens County
Certificate filed in Kings County
Certificate filed in New York County
Term Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

HOWARD E. SAFT, et al.,

Defendants.

:
:
:
:
:
:

76 CR 414 (LWP)

REPLY AFFIDAVIT OF
ANGELO T. COMETA

STATE OF NEW YORK)

SS.:

COUNTY OF NEW YORK)

ANGELO T. COMETA, being duly sworn, deposes and says:

As the attorney for Howard E. Saft, the defendant herein, I am submitting this affidavit in response to the affidavit of Assistant United States Attorney Steven A. Schatten, and in further support of Mr. Saft's motion to withdraw his plea of guilty.

Ordinarily I might have chosen not to reply to an affidavit in opposition, particularly in the face of Mr. Saft's own affidavit in response. However, the nature of Mr. Schatten's opposing papers compels me to bring to the Court's attention a series of statements which can be characterized as nothing less than outrageous.

The prosecutor has attached to his affidavit, Mr. Saft's grand jury testimony adduced on May 9, 1975 (Ex. 2, Schatten aff'd,

12/8/76). This use of grand jury testimony and its divulgence in the course of a motion which is, by its very nature, a public one, is violative of the Federal Rules of Criminal Procedure, Rule 6(e) "Secrecy of Proceedings and Disclosure." Rule 6(e) mandates the total confidentiality of matters occurring before the grand jury and contains an explicit admonition against the divulgence of any recorded testimony by any attorney involved in the grand jury proceeding -- obviously including the prosecuting attorney. Inasmuch as this Court has never directed the public disclosure of any portion of the transcript relating to these grand jury proceedings, it was illegal for Mr. Schatten to attach to his affidavit the grand jury testimony of Mr. Saft. Nor can it be stated that the prosecutor's public disclosure of the grand jury transcript is justified by the defendant's prior discovery of his testimony for possible use, at the defendant's sole option and discretion, in pre-trial motions addressed to the indictment.

What is even more disturbing, however, is the prosecutor's motivation for the inclusion of this grand jury testimony in his affidavit. Paying lip service to the use of the privilege against self-incrimination, Mr. Schatten seeks to take unjust advantage from what he considers to be certain implications which flow from the very invocation of the privilege itself. In other words, the prosecutor poisons the atmosphere by stating in effect, "We know that Mr. Saft has the right to invoke his privilege, but

the privilege is inconsistent with the assertion of innocence" -- particularly in the context of this motion. This clear departure from the principles of fairness gives some indication of the lengths to which this prosecutor will go to defeat the present motion.

In another vein, Mr. Schatten charges me with a violation of the American Bar Association Standards Relating to The Administration of Criminal Justice. This was done in the context of my conversations with David Fox, Esq., particularly with reference to Mr. Schatten's attempt to have ex parte conferences with Mr. Fox which I believe would go far beyond the normal preparation of the government's opposition to this motion, and might well involve a discussion of matters particularly crucial to Mr. Saft's defense at a future trial. I have no objection whatever to the government's questioning Mr. Fox, but I reiterate what I consider to be an appropriate and totally ethical position: that any disclosure by Mr. Fox be done in a court supervised forum in the interests of justice. My letter to the Court, dated November 29, 1976, is attached hereto as Exhibit A.

I should also note with respect to Mr. Schatten's repeated suggestions that I improperly denied Mr. Fox an opportunity to read Mr. Saft's statement prior to the time that Mr. Fox was to submit an affidavit attached to Mr. Saft's motion (Schatten aff'd., e.g., pp. 8, 10), the fact is that in a communication with my office, Mr. Fox was informed of the substance of Mr. Saft's statement,

and Mr. Fox then stated that he did not want to see a copy of Mr. Saft's affidavit prior to preparing his own affidavit.

Mr. Schatten's selected use of the ABA Standards is particularly interesting when it is seen that he himself violated Section 3.6(e) of the Prosecution Function of the same Standards Relating to the Administration of Criminal Justice. Early in the criminal investigation, and while the grand jury was still sitting, Mr. Schatten compelled the appearance of Mr. Saft before that grand jury, notwithstanding the fact that Mr. Saft's counsel at that time, Sandor Frankel, Esq., formally advised Mr. Schatten that his client, a target of the investigation, would invoke his constitutional rights under the Fifth Amendment if called to testify.

Section 3.6 of the Prosecution Function reads as follows:

"The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law."

When Mr. Frankel advised the prosecutor in writing that Mr. Saft would invoke his privilege if called to testify, Mr. Schatten should have obeyed the mandate of the ABA's Standards.

He chose, however, to disregard it and subjected Mr. Saft to a series of questions which he knew in advance, would be met with the invocation of the privilege. This was improper and clearly in violation of the ABA Standards.

Mr. Schatten's affidavit is riddled with irrelevant comments calculated to prejudice the interests of the defendant. Thus we find the prosecutor characterizing the defendant as a "politically well-connected individual" (p.2 Schatten aff'd.). The prosecutor seeks additional mileage when he adverts to an investigation of Mr. Saft by the office of the Watergate Special Prosecutor which he does in two places in his affidavit, notwithstanding the fact that it has no bearing whatsoever on the pending motion (pp.2, 21, Schatten aff'd.). Adverting to "Mr. Saft's Swiss business connections" (p.4, Schatten affidavit) is equally improper and irrelevant.

Mr. Schatten's efforts at prejudicing Mr. Saft know no bounds. Thus, he seeks to take advantage of hearsay comments relating to allegations made to him by an IRS special agent concerning penalties allegedly assessed in past years against Adlay Jewelry (p.21, Schatten aff'd.). Additional prejudicial hearsay in connection with an accountant's advice to Mr. Schatten relating to the affidavit submitted on Mr. Saft's behalf by Jack Portney, CPA, is also improper (p.23, Schatten aff'd.).

The memoranda of law submitted on Mr. Saft's behalf sets forth in detail the inadequacy of the government's contention that it would be prejudiced by the granting of this motion. The claim of prejudice is disingenuous. It should suffice to say that inconvenience to the government and to its witnesses is clearly not evidence of prejudice.

Mr. Saft's cause is clearly meritorious. In the interests of justice and fairness, the motion should be granted in all respects.

Angelo T. Cometa
Angelo T. Cometa

Sworn to before me this

15th day of December, 1976.

Gertrude Eisler
GERTRUDE EISLER
Notary Public, State of New York
No. 41-6166850 Queens County
Certificate filed in Kings County
Certificate filed in New York County
Term Expires March 30, 1978

November 29, 1976

Hon. Lawrence W. Pierce
United States District Judge
U.S. Court for the Southern District
of New York
Foley Square
New York, N.Y. 10007

Re: Howard E. Saft
76 CR 414

Dear Judge Pierce:

It has come to our attention that Asst. U.S. Attorney Steven Schatten has been in communication with my predecessor counsel, David Fox. Mr. Schatten has sought to engage Mr. Fox in conversation concerning Mr. Saft's pending motion to withdraw his guilty plea.

We do not think it appropriate for Mr. Schatten to engage Mr. Fox in any ex parte communications at this time. Because of the nature of Mr. Saft's motion, it may not be necessary for the Court to reach any question of the voluntariness of Mr. Saft's plea but should it do so, and in the further event that the Court determine that Mr. Fox's recollection of the circumstances surrounding the plea be set forth in greater detail than is reflected in Mr. Saft's written submission on the motion, we urge that any such further statement from Mr. Fox be in the form of testimony in open court in the presence of counsel.

Our concern transcends the issues raised by Mr. Saft's pending motion. We understand that, under appropriate circumstances, it may be legitimate for the prosecutor to inquire of prior counsel

EXHIBIT A

Hon. Lawrence W. Pierce

-2-

November 29, 1976

the facts surrounding the taking of a plea. However, we do not believe that it is proper for the prosecutor to have any conversations with Mr. Fox unless these conversations are supervised by the Court and strictly limited to the issues posed by the motion. Otherwise, it might be possible for Mr. Schatten to engage Mr. Fox in conversation involving the merits of Mr. Saft's defense, thereby severely prejudicing his interests, particularly as they relate to a future trial of this matter.

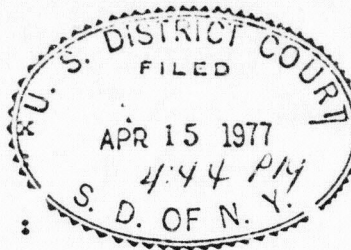
We submit that Mr. Saft's motion can and should be granted on the basis of undisputed facts, without a hearing. However, if the Court determines that a hearing is appropriate, Mr. Saft stands ready to testify together with any other witnesses the Court deems appropriate on the issues presented by the motion. But we reiterate that any communications between the Government and prior counsel to Mr. Saft be limited to a forum supervised by the Court.

Respectfully,

Angelo T. Cometa

ATC:ge
(by hand)
(cc: Asst. U.S. Attorney
Steven Schatten
David Fox, Esq.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



A 143

ANGEL PEREZ,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA

-v-

ANGEL PEREZ,

Defendant.

77 Civ. 951
PRO SE

76 Cr. 118

45788

CHARLES L. WEINTRAUB, ESQ.

1345 Avenue of the Americas, New York, N.Y. 10019
Attorney for Defendant Perez in 76 Cr. 118 only

HON. ROBERT B. FISKE, JR.

United States Attorney for the
Southern District of New York
Attorney for the United States of America
JEFFREY L. LIVINGSTON, ESQ.,
LEE S. RICHARDS, ESQ.,
Assistant United States Attorneys
Of Counsel

MEMORANDUM

BONSAL, D. J.

Petitioner Angel Perez petitions pursuant to 28 U.S.C.
§2255 and moves pursuant to Rule 32(d) of the Federal Rules of

Criminal Procedure for relief from the sentence imposed upon him on May 3, 1976. In his application and motion petitioner seeks to have the Court set aside his conviction and sentence and permit him to withdraw his plea of guilty. Therefore, they are considered together.

Petitioner was charged in a two-count indictment with conspiracy to violate the federal narcotics laws and with the distribution and possession with intent to distribute approximately two ounces of heroin. On March 19, 1976, he pleaded guilty to the distribution count. On May 3, 1976, he was sentenced to a term of imprisonment of four years and a term of special parole of three years to commence on his release from prison.

In his petition for relief pursuant to 28 U.S.C. §2255 (in which he proceeds pro se) petitioner contends that he was not informed by the Court prior to the time of his sentencing of the possibility of his being sentenced to a period of special parole and that he would not have pleaded guilty had he known of this possibility.

In his motion for relief pursuant to Rule 32(d) (in which he is represented by counsel) petitioner contends that he was not explicitly informed of the rights specified in Rule 11 (Fed.R.Cr.P.). In particular, he contends that he was not advised: (1) that he faced possible lifetime parole; (2) that he had the right to persist in his plea of not guilty; (3) that he would have the right to assistance of counsel at trial; (4) that by pleading guilty he waived his right against self-incrimination; and (5) that the Court

might ask him questions about the offense, and that if he answered them under oath on the record and in the presence of counsel, his answers might later be used against him in a prosecution for perjury or false swearing. Petitioner further contends that the Court did not inquire into whether his plea resulted from discussions between the attorney for the Government and himself or his attorney. Petitioner contends that under the Court of Appeals' recent decision in United States v. Journet, 544 F.2d 633 (2d Cir. 1976), decided almost eight months after his plea, the Court's failure to cover these matters at the time he pleaded guilty requires that the judgment of conviction be set aside and that he be permitted to withdraw his plea.

In response, the Government contends: (1) that jurisdiction to grant the collateral relief requested by petitioner is not provided by either 28 U.S.C. §2255 or Rule 32(d); (2) that the Journet decision should not be given retroactive effect; and (3) that petitioner was not prejudiced.

Discussion

Considering the issue raised in the §2255 petition in the light most favorable to petitioner for purposes of jurisdiction, it appears that the petition presents a cognizable claim. See Davis v. United States, 417 U.S. 333 (1974). Moreover, under Rule 32(d) the Court may set aside the judgment of conviction and permit a defendant to withdraw a guilty plea "to correct manifest injustice".

Regarding the §2255 petition, the transcript of the plea includes the following colloquy:

"THE COURT: . . . And you understand that the sentence provided in the statute could be a possible sentence of up to fifteen years in prison?

THE DEFENDANT: Yes, sir.

THE COURT: And a fine of up to \$25,000?

THE DEFENDANT: Yes, sir.

THE COURT: And you further understand that if you were given a prison sentence here, you would be placed on special parole for at least three years following your release?

THE DEFENDANT: Yes, sir.

THE COURT: And that if you were placed on special parole and you violated that parole in any way, you could go back to serve the balance of your sentence?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that?

THE DEFENDANT: Yes, I do."

It is clear that petitioner was informed of the special parole provision in 21 U.S.C. §841 (b) (1) (A).

With respect to petitioner's Rule 32(d) motion, while the Court did not expressly enumerate each of the elements of Rule 11, the record discloses that the Court completed a thorough examination of petitioner at the time of his plea of guilty and ascertained that his plea was voluntary and that he was aware of his rights. Thus the only question presented here is whether the technical failure to meet the requirements of the Journet decision mandates that petitioner's conviction be set aside and that he be permitted

to withdraw his plea. For the reasons stated below, the Court holds that it does not.

Only shortly before the Journet decision, the Court of Appeals in Kloner v. United States, 535 F.2d 730, 733 (2d Cir. 1976), re-stated the general rule that a guilty plea would not be invalidated merely because the court did not enumerate for a defendant the rights he was waiving by pleading guilty and held that on the basis of the totality of the circumstances there had been compliance with Rule 11. Prior to Journet this "totality of the circumstances" test was thought to define the standard to be applied by district courts in accepting pleas. United States v. Saft, Dkt. No. 76 Cr. 414 (S.D.N.Y. February 17, 1977). Considering the purpose of the new rule enunciated by Journet, the extent of reliance on the former practice, and the effect that retroactive application would have upon the administration of justice, Halliday v. United States, 394 U.S. 831, 832 (1969); Rosenfeld v. United States, 451 F.2d 770 (2d Cir. 1971), cert. denied, 406 U.S. 973 (1972), retroactive application of Journet would clearly be improvident and unwarranted. United States v. Saft, supra. As Judge Pierce observed in United States v. Saft:

"The purpose and effect of Journet has been to mandate a specific procedure for the taking of guilty pleas in the future; reliance on the 'totality of the circumstances' approach was widespread, and it is abundantly clear that a retroactive application of Journet's 'each and every' standard would mandate the vacating of scores of guilty pleas entered in this court, many of which have been followed by the imposition of a prison sentence, and thus would have a substantial impact upon the administration of justice. Accord-

A 148 ingly, under the precedent of decisions considering the retroactive application of judicial interpretation of Rule 11's requirements, the Court concludes that Journet is not retroactive to this case."

Retroactive application of Journet in each instance where exact compliance with the language of Rule 11 was lacking would indeed open a "Pandora's Box" to prisoners disappointed that their guilty pleas did not result in probationary sentences or lesser sentences of imprisonment.

Apart from petitioner's contention that he would not have pleaded guilty had he known of the possibility of his being sentenced to a period of special parole -- a contention that has been shown to have been factually incorrect -- petitioner has made no claim that he was prejudiced in any way by the proceedings at his plea or sentencing. Petitioner not only gave a factual statement of his guilt at the time of his plea and admitted his guilt at the time of sentencing, but he also admitted to having a substantial prior criminal record, which would indicate some familiarity with legal proceedings. Since petitioner's plea was taken prior to Journet under circumstances indicating that he was aware of his rights, "it would be a needlessly rigid construction of Rule 11 to hold that the guilty plea on this record must be set aside."

United States v. Michaelson, ___ F.2d ___, ___ (2d Cir., March 31, 1977).

For the foregoing reasons, petitioner's applications pursuant to 28 U.S.C. 52255 and to Rule 32(d) for relief from the sentence imposed upon him is denied.

It is so ordered.

Dated: New York, N.Y.
April 14, 1977

DUDLEY B. BORSAL

U. S. D. J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
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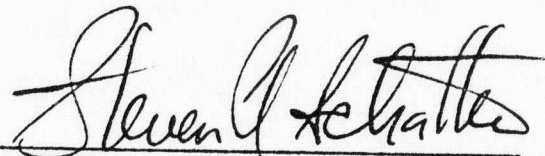
STEVEN A. SCHATTEN being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 25th day of May, 1977,
he served a copy of the within brief and appendix
by placing the same in a properly postpaid franked
envelope addressed:

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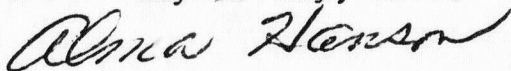
Attention: Angelo T. Cometa, Esq.

And deponent further says that he sealed the said
envelope and placed the same in the mail chute drop for
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City of New York.



STEVEN A. SCHATTEN
Assistant United States Attorney

Sworn to before me this
25th day of May, 1977.



ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified In Kings Co.
Commission Expires March 30, 1978